

APPENDIX

Supreme Court of the United States

October Term, 1973.

No. 73-203.

MORTON EISEN,

Petitioner,

v.

CARLISLE & JACQUELIN, et al.

**On Writ of Certiorari to the United States Court of Appeals
For the Second Circuit.**

**Petition for Certiorari Filed July 30, 1973.
Certiorari Granted October 15, 1973.**

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DISTRICT COURT DOCKET ENTRIES

No. 66 Civ. 1265

- 5- 2-66 Filed complaint and issued summons.
- 5-10-66 Filed summons & return, served all defts. 5-4-66.
- 5-13-66 Filed stip. & order extending defts' time to answer to 6-24-66—McLean, J.
- 6- 8-66 Filed Pltff's notice of taking deposition of Henry I. Cobb, Jr.
- 6- 8-66 Filed Pltff's notice of taking deposition of deft. DeCoppet & Doremus by Reginald P. Rose.
- 6- 8-66 Filed Pltff's notice of taking deposition of deft. Carlisle & Jacquelin by Van R. Halsey.
- 6-15-66 Filed stip & order adjourning deposition of Carlisle & Jacquelin to 7-25-66, 7-27-66 & 8-30-66 as indicated—Tenney, J.
- 6-17-66 Filed Deft's interrogs.
- 6-27-66 Filed Answer of deft. Carlisle & Jacquelin.
- 6-28-66 Filed Answer of DeCoppet & Doremus.
- 6-30-66 Filed Answer of deft. New York Stock Exchange.
- 6- 5-66 Filed Pltff's answers to defts' interrogs.
- 7- 6-66 Filed defts (Carlisle) affdt & notice of motion—
Re: action is not maintainable as a class action—Ret. 7-12-66.
- 7- 6-66 Filed defts' memorandum in support of motion.
- 7- 8-66 Filed pltff's affdvt. in opposition to deft's motion by Robert Zicklin.

(A1)

- 7- 8-66 Filed plttf's affdvt. of Morton Eisen in opposition to defts' motion.
- 7- 8-66 Filed plttf's memorandum in opposition to defts' motion.
- 5-19-66 Filed stip. & order adjourning depositions of deft. by Van. R. Halsey, et al to 9-26-66; 9-28-66 & 9-30-66 respectively—Wyatt, J.
- 9-27-66 Filed stip. & order adjourning depositions of deft. Carlisle & Jacquelin by Van R. Halsey, deft. DeCoppet & Doremus by Reginald P. Rose & Witness Henry I. Cobb, Jr. to 10-26-66, 10-28-66 & 10-31-66 respectively—Tyler, J.
- 7-12-66 Filed reply memorandum in support of motion for order determining action to be a class action (filed in court).
- 9-30-66 Filed Opinion #32,793—Defts' motion is granted to the extent that this action, as a class action, is dismissed. This does not mean, however, that the complaint viewed solely as a statement of the individual claims of plttf. Eisen is dismissed; moreover, nothing herein stated should be construed as a ruling on the merits, or lack thereof, of the claims pleaded on behalf of plttf. individually—It is so ordered—Tyler, J.—mailed notice.
- 10-10-66 Filed plttf's affdvt. & notice of motion—Resettle order—Ret. 10-25-66.
- 10-10-66 Filed memorandum of plttf in support of its motion.
- 10-21-66 Filed defts' memorandum in opposition to motion for amendment & resettlement of order to include statement under 28 U.S.C.1292(b).

- 10-25-66 Filed stip & order adjourning depositions of deft & Henry I. Cobb, Jr. to 1-24-67 & 1-26-67 & 1-30-67—MacMahon, J.
- 10-25-66 Filed memo—endorsed on motion dated 10-10-66—motion for resettlement is denied—so ordered—Tyler, J. mn
- 10-26-66 Filed plttf's reply memorandum in support of its motion.
- 10-28-66 Filed bond for security for costs—US Fidelity & Guaranty Co.
- 10-28-66 Filed plttf's notice of appeal—mailed copies to Carter, Ledyard & Milburn, Kelley Drye, Newhall M&W—& Milbank Tweed Hadley & McCloy.
- 12- 7-66 Filed stip & order extending plttfs time to docket record on appeal to 11-16-67—Palmieri, J.
- 1- 9-67 Filed stip & order adjourning depositions of deft Carlisle & Jacquelin et al to be held on dates indicated—Mansfield, J.
- 2-24-67 Filed certification of record on appeal.
- 4-24-67 Filed stip & order adjourning depositions of deft's Carlisle & Jacquelin et al to be held on dates indicated—Frankel, J.
- 11-13-67 Filed stip & order adjourning depositions of defts' Carlisle & Jacquelin et al to be held on dates indicated—Ryan, J.
- 4- 3-68 Filed stip and Order that plttfs. depositions of deft. Carlisle & Jacquelin by Van R. Halsey, of deft. DeCoppet & Doremus by Reginald P. Rose and of witness Henry I. Cobb, Jr., which

were previously adj. to April 8, April 10, and April 12, 1968 are further adj. to be held on September 25, September 27, and September 30, 1968, same time and place—Tyler, J. so ordered.

- 4-10-68 Filed Opinion and Order from USCA that the order is reversed and that the action is remanded to said District Court for the proceedings in accordance with the opinion of this court with costs to the appellant. m/n
- 6-28-68 Filed transcript of record of proceedings of June 7, 1968.
- 8- 6-68 Filed stip and order ext. time to Sept. 4-68 and Oct. 15-68 to exchange of informal requests for admissions. Tyler, J.
- 9- 9-68 Filed deft's affidavits and notice of motion to disqualify plttfs' attys ret. 9-17-68.
- 9- 9-68 Filed deft's memorandum in support of their motion ret. 9-17-68.
- 9-25-68 Filed stip and order plttf's depositions of deft's Carlisle & Jacquelin, DeCoppet & Doremus & witness Henry I. Cobb, Jr., are further adjourned to 1-15-69, 1-17-69 and 1-20-69. So ordered. Bryan, J.
- 9-27-68 Filed plttf's affidavit by Robert Zicklin in connection with deft's motion to disqualify plttf's attorneys.
- 9-26-68 Filed memo—endorsed on motion filed Sept. 9-68. This motion is withdrawn in open court today after Pomerantz, Levy, Haudek & Block and Laventhall & Zicklin withdraw as counsel for

plaintiff in this action. It is so ordered. Tyler, J.

- 2-13-69 Filed plttf's designation of trial counsel.
- 4-10-69 Filed plttf's attorneys notice of appearance.
- 8-22-69 Filed transcript of record of proceedings before Tyler, Jr., J. dated 9-26-68.
- 10-22-69 Filed plttf's interrogs.
- 10-28-69 Filed stip that the time which the deft's may object to plttf's interrogs is ext. to 11-6-69.
- 11-10-69 Filed stip & order that deft's may object to plttf's interrogs is ext. until 11-21-69. So ordered. Murphy, J.
- 11-17-69 Filed deft's (The "Exchange") answers to interrogs.
- 4-17-70 Filed affdvt of Wm E. Jackson, attys for deft NY Stock Exchange in response to plttf's motion pursuant to Rule 2.
- 4-17-70 Filed Memo Endorsed on affdvt of Wm E. Jackson, "Motion denied w/o prejudice to a new motion for assignment under rule 2 to a judge for all purposes after Judge Tyler resolves the matter remanded by the Court of Appeals and such resolution becomes final. It is so ordered: Sugarman, Ch J." m/n
- 4-17-70 Filed Plttf's affdvt & Notice of motion for an order assigning this action to Tyler, J. for all purposes. — Endorsement entered this day above.
- 7-13-70 Filed Transcript of record of proceedings, dated March 16, 1970.

- 8-19-70 Filed Transcript of record of proceedings, dated June 19-70.
- 8-19-70 Filed Transcript of record of proceedings, dated April 30, 1970.
- 10- 9-70 Filed Opinion #37118 by Tyler, J. "• • • This Court is unable to decide upon the present record the class action motion at this time, and this memorandum should in no way be construed as even a tentative view on the merits of that question. Further information from the parties will be required so that all possible aspects of the class action may be examined and determined. Accordingly counsel are directed to appear at a conference in Room 2704 on 10-16-70 at 12 noon in order to discuss the matters set forth above and any other items they deem pertinent to the class action determination. It is so ordered. Tyler, J. (mailed notices)
- 1-13-71 Filed affdvt of Russell E. Brooks, atty for deft. in response to the opinion and order of the Court filed Oct. 9, 1970 etc.
- 1-12-71 Filed affdvt of Richard Allan, atty for deft De-Coppet & Doremus.
- 1-13-71 Filed defts' supplemental memorandum in support of motion to dismiss this action as a class action.
- 4- 7-71 Filed Opinion #37524. Tyler, J. The defendants motion to dismiss is denied; This case may be maintained as a class action, and the Court orders a further hearing to determine

District Court Docket Entries

A7

who should pay for the Notice pur. to Rule 23.
(59 pages) (mailed notices)

- 5-25-71 Filed affdvt of Mordecai Rosenfeld atty for plttf.
- 5-25-71 Filed plttf's reply memorandum.
- 5-25-71 Filed defts' proposed findings and conclusions.
- 5-25-71 Filed defts DeCoppet & Doremus & New York Stock Exchange in support of motion to dismiss this action as a class action.
- 5-25-71 Filed plttf's proposed findings of fact and brief in opposition to defts' motion to dismiss.
- 5-25-71 Filed deft Carlisle & Jacquelin post-hearing brief.
- 5-25-71 Filed plttf's reply memorandum.
- 5-25-71 Filed plttf's proposed findings of fact and brief in opposition to defts motion to dismiss.
- 5-25-71 Filed deft Carlisle & Jacquelin post-hearing brief.
- 5-25-71 Filed defts' proposed findings and conclusions.
- 5-25-71 Filed defts DeCoppet & Doremus and New York Stock Exchange in support of motion to dismiss this action as a class action.
- 5-25-71 Filed defts' supplemental memorandum in support of motion to dismiss this action as a class action.
- 5-25-71 Filed plttfs supplemental memorandum.
- 5-25-71 Filed defts' memorandum responding to questions of opinion filed Oct. 9, 1970.
- 5-25-71 Filed affdvt of Richard Allan atty for defts. De-coppet & Doremus.

- 5-25-71 Filed affdvt of Russell E. Brooks atty for deft. New York Stock Exchange.
- 5-25-71 Filed affdvt of Arthur J. Galligan atty for twenty states, the Dist. of Columbia etc.
- 5-25-71 Filed affdvt of Mordecai Rosenfeld atty for the plttf.
- 5-25-71 Filed stipulation Number 1, Defts Exhibit A.
- 5-25-71 Filed stipulation No. 2, Defts Exhibit B.
- 5-25-71 Filed Transcript of record of proceedings, dated 4-30-70.
- 7-30-71 Filed plttf's notice to produce.
- 7-30-71 Filed plttf's notice to produce.
- 7-30-71 Filed plttf's interrogs.
- 7-30-71 Filed plttf's interrogs.
- 8-23-71 Filed Transcript of record of proceedings, dated 5-17-71.
- 11-10-71 Filed Affdvt of Herbert E. Milstein.
- 11-19-71 Filed Order—Adjourned to Review calendar for May 16 1972. Edelstein Ch J. m/n
- 12-15-71 Filed Memorandum by Tyler, J.—“Accordingly, it is ruled that the office of Harold E. Kohn, P.A. may participate in this case as co-counsel for plttf effective today.” (mailed notices)
- 12-15-71 Filed Defts' reply memorandum in support of request to deny application of Kohn firm to participate in this action.
- 12-15-71 Filed Plttf's memorandum in opposition to defts' request that the Kohn firm be disqualified to act as co-counsel for plttf.

- 12-15-71 Filed Memorandum in support of application for leave to appear pro-hac-vice.
- 12-15-71 Filed Letter dtd 11-24-71 from Carter, Ledyard & Milburn to Tyler J.
- 12-15-71 Filed Letter dtd 11-19-71 from Milbank, Tweed, Hadley to Tyler J.
- 12-15-71 Filed Letter dtd 12-9-71 from Mordecai Rosenfeld to Tyler, J.
- 12-15-71 Filed Letter dtd 11-24-71 from Mordecai Rosenfeld to Tyler, J.
- 12-15-71 Filed Affidvt of Herbert Milstein from office of Harold Kohn.
- 12-23-71 Filed Transcript of record of proceedings, dated 10-1-1971.
- 4- 4-72 Filed Opinion #38398 by Tyler, J.—Including Findings of Fact & Conclusions of Law. “On the basis of this opinion, it appears that plttf and the class he represents are more than and the class he represents are more than likely to prevail at trial or upon a motion for summary judgment. Rule 56 FRCP. I conclude, therefore, that defts should bear 90% of the costs of R. 23 (c) (2), FRCP notice to the class. Of defts’ share, one-half should be borne by the Exchange and one-half by the odd-lot defts. The remaining 10% which represents the “hazards of litigation”, must be put up by plttf. It is so ordered. Tyler J.” (mailed notices)
- 4- 4-72 Filed Plttf’s brief on the allocation of the cost of notice.

- 4- 4-72 Filed Pltff's brief on the allocation of the cost of notice.
- 4- 4-72 Filed Deffts' post-hearing memorandum.
- 4- 4-72 Filed transcript of record of proceedings of Dec. 13, 1971.
- 4- 4-72 Filed transcript of record of proceedings of Nov. 5, 1971.
- 4-19-72 Filed Memorandum by Tyler, J.—“For the information of counsel in this case, there are attached two letters dtd 4-8-72 from persons expressing a desire to participate in this suit.” (mailed notices)
- 5- 2-72 Filed true copy of USCA order directing the Clerk of the USDC for SD of NY to transmit the record to the Court of Appeals.
- 5- 2-72 Filed deft Jacquelin notice of appeal to U.S.C.A.—mailed notices.
- 5- 9-72 Filed Pltff's Affdvt & motion for an order enforcing a settlement agreement, with Memo Endorsed: “Motion denied for reasons dictated to Court reporter at hearing therein this afternoon. Pending developments in the next few weeks, these papers will remain sealed in the files of the undersigned. Tyler, J.” (mailed notices)
- 5- 9-72 Filed Memorandum & Order.—“I can conceive of no useful or proper purpose to be achieved by including these matters in the appellate record. On the other hand, I see no reason to continue the “sealing” thereof in my chambers. Hence, the dispute is resolved as follows: (1) the

record of the motion and disposition thereof is hereby unsealed with instructions to the Clerk to docket same; and (2) Subject to final approval of the Court of Appeals, & without prejudice to any applications which the parties may care to make to that court, pltff is directed not to include the record of that motion in the record on appeal. It is so ordered. Tyler J. (mailed notice)

- 5- 9-72 Filed Defts' memorandum in opposition to motion for enforcement settlement agreement.
- 5- 9-72 Filed Defts' memorandum in support of cross-motion for a protective order.
- 5- 9-72 Filed Affdvt of Bud G. Holman, atty for deft Decoppet & Doremus.
- 5- 9-72 Filed Affdvt of Wm. E. Jackson, atty for NY Stock Exchange Inc.
- 5- 9-72 Filed Defts' notice of cross-motion for a protective order ret. 10-1-71.
- 5- 9-72 Filed Pltff's reply memo in support of motion to enforce settlement.
- 5- 9-72 Filed Affdvt of Mordecai Rosenfeld, atty for pltff.
- 5- 9-72 Filed Pltff's memo in opposition to defts' motion for protective order.
- 5- 9-72 Filed Pltff's memo in support of motion to enforce settlement.
- 5-16-72 Filed Notice that the record on appeal has been certified and transmitted to the U.S.C.A. for the 2d Circuit on May 16 1972.

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District Court Docket Entries

5-31-72 Filed Transcript of Record of Proceedings dated
2/9/72.

6-13-72 Filed Plaintiff's Designation of Exhibits.

A True Copy.

JOHN LIVINGSTON, Clerk

By B. EDWARDS
Deputy Clerk

[SEAL]

**UNITED STATES COURT OF APPEALS
DOCKET ENTRIES
No. 30934**

- 11-15-66 Filed motion to dismiss
- 11-15-66 Filed memorandum in support of motion to dismiss
- 11-18-66 Filed order adjourning motion to dismiss to 12-5-66
- 12- 1-66 Filed order adjourning motion to dismiss to 12-12-66
- 12- 2-66 Filed affidavit in opposition to motion to dismiss
- 12- 2-66 Filed memorandum of appellant in opposition to motion to dismiss
- 12- 9-66 Filed reply memorandum in support of motion to dismiss
- 12-19-66 Motion to dismiss denied, Kaufman, CJ
- 1- 3-67 Filed petition for rehearing and rehearing in banc
- 1- 6-67 Filed order extending time to file record to 2-27-67
- 1-13-67 Petition for rehearing denied, Per Curiam
- 1-13-67 Filed order denying petition for rehearing
- 1-13-67 Petition for rehearing in banc denied, Per Curiam
- 1-13-67 Filed order denying petition for rehearing in banc
- 2-24-67 Filed record (original papers of District Court)
- 3- 3-67 Filed order extending time to file appellant's brief & appendix to 5-22-67

- 3-16-67 Certified appendices & proceedings to Millbank, Tweedy, Hadley & McCloy, Esqs. [sic]
- 3-29-67 Filed notice of filing of petition for writ of certiorari
- 4-21-67 Filed order extending time to file appellant's brief & appendix to 6-30-67
- 5-11-67 Filed certified copy of order of Supreme Court denying petition for writ of certiorari
- 6-23-67 Filed order extending time to file appellant's brief & appendix to 7-14-67
- 7-14-67 Filed application and order granting leave to file appellant's brief not to exceed 62 pages
- 7-14-67 Filed appendix, appellant
- 7-14-67 Filed brief, appellant
- 7-20-67 Filed order extending time to file appellees brief & appendix to 10-2-67
- 9-22-67 Filed application and order (endorsed) adjourning argument of appeal until a day from 11-6-67 thru 11-9-67 as consisting with other docket demands
- 10- 2-67 Filed brief, appellees (Decoppet & Doremus and N.Y. Stock Exchange)
- 10- 2-67 Filed brief, appellee (Carlisle & Jacquelin)
- 10-27-67 Filed reply brief, appellant
- 11- 6-67 Argument heard (by: Lumbard, ChJ., Medina & Hays, CJJ)
- 3- 8-68 Judgment Reversed & Action Remanded, Medina, CJ & jurisdiction retained

Court of Appeals Docket Entries

A15

- 3- 8-68 Dissenting in separate opinion, Lumbard, CHJ.
- 3- 8-68 Filed judgment
- 4- 9-68 Filed bill of costs
- 4- 9-68 Issued Mandate (opinion, judgment & bill of costs)
- 6-20-68 Original record returned to District Court
- 6-25-68 Filed receipt of return of original record to District Court
- 5-24-71 Filed motion for an order fixing a briefing schedule, date of oral argument, etc. with proof of service
- 5-25-71 Filed affidavit in opposition to motion for an order fixing briefing schedule, etc. with proof of service
- 5-26-71 Filed motion to direct Clerk of Southern District to transmit the record on appeal with proof of service.
- 6-10-71 Filed order denying motion to set briefing schedule and date for argument of appeal
- 6-10-71 Filed order denying motion to direct Clerk of District Court to certify and transmit record
- 4-11-72 Filed motion to direct Clerk of district court to certify and transmit record with proof of service
- 4-11-72 Filed motion for an order fixing briefing schedule and date for oral argument with proof of service
- 4-19-72 Filed memorandum in opposition to motion for briefing schedule and hearing with proof of service

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Court of Appeals Docket Entries

- 4-24-72 Filed reply memorandum in support of motion
(appellees), with proof of service
- 5- 1-72 Filed order denying motion to set briefing schedule, etc.
- 5- 1-72 Filed order granting motion to direct clerk of
USDC to certify and transmit record, etc.

A true copy,

A. DANIEL FUSARO
Clerk

[SEAL]

[Subsequent docket entries in No. 30934 are entered jointly in No. 72-1521, *infra*]

No. 72-1521

- 5- 9-72 Filed copies of docket entries and notice of appeal
- 5-16-72 Received record (original papers of district court)
- 5-17-72 Filed motion to dismiss with proof of service
- 5-17-72 Filed record (original papers of district court)
- 5-23-72 Filed motion to supplement original record with proof of service
- 6- 8-72 Filed memorandum in opposition to motion to dismiss with proof of service
- 6- 8-72 Filed memorandum in opposition to motion to supplement the original record with proof of service
- 6-13-72 Filed reply to memorandum in opposition to motion to supplemental original record with proof of service
- 6-13-72 Filed order directing that motion to dismiss the appeal be respectfully referred to the panel of judges which heard the previous appeal
- 6-13-72 Filed order directing that motion for leave to supplement the record on appeal is respectfully referred to the panel of judges which heard the previous appeal
- 6-16-72 Filed appellee's designation of items for inclusion in appendix
- 6-21-72 Filed supplemental record. (original papers of district court)

- 6-29-72 Filed order denying motion for leave to supplement the record on appeal
- 6-29-72 Filed order denying motion to dismiss
- 7- 3-72 Filed order extending time to file appellants brief and appendix to 7-26-72; appellee's brief to 9-29-72
- 7-26-72 Filed motion setting a briefing schedule, date of oral argument and for leave to file an oversize brief with proof of service (& in 30934)
- 8-24-72 Filed order directing appellee's brief to be filed by 9-29-72; appellant's reply brief to be filed by 10-13-72, WHICH is not to exceed 56 printed pages; date of oral argument will not be fixed until after all briefs are in (& in 30934)
- 8-25-72 Filed brief, defendants-appellees (Appellants) with proof of service (& in 30934)
- 8-25-72 Filed appendix, defendants-appellees (appellants) with proof of service (& in 30934)
- 9-29-72 Filed application and order granting leave to file appellee's brief not to exceed 52 pages (& in 30934)
- 9-29-72 Filed brief, appellee with proof of service (& in 30934)
- 10-13-72 Filed application and order granting leave to file appellees reply brief not to exceed 27 pages (& in 30934)
- 10-13-72 Filed reply brief, appellees with proof of service (& in 30934)

- 12-12-72 Argument heard (by : Medina, Lumbard and Hays, CJJ) (& in 30934)
- 12-12-72 Order granting leave to file Supplemental Briefs with References to Remand Proceedings before Judge Tyler and 10 days for further Briefing on the issues, but no Reply Briefs will be permitted without leave of the Court (& in 30934)
- 12-22-72 Filed supplemental statement of appellees with proof of service (& in 30934)
- 12-22-72 Filed supplemental brief of plaintiff-appellee with proof of service (& in 30934)
- 5- 1-73 Judgment Revtrsed (& in 30934) Medina, CJ
- 5- 1-73 Judgment Reversed (& in 30934) Medina, CJ
- 5- 1-73 Filed judgment (& in 30934)
- 5-14-73 Filed petition for a rehearing with a suggestion for a rehearing in banc, with p/s
- 5-15-73 Filed itemized and verified bill of costs, with p/s
- 5-24-73 Filed order denying petition for rehearing
- 5-24-73 Filed order denying petition for rehearing in banc
- 5-24-73 Petition for rehearing in banc denied, Kaufman, CJ with whom Friendly, ChJ., Feinberg, Mansfield, Mulligan, CJJ concur
- 5-24-73 Concurring in separate opinion, Mansfield, CJ
- 5-24-73 Dissenting in separate opinion, Hays, CJ
- 5-24-73 Dissenting in separate opinion, Oakes, CJ with whom Timbers, CJ concurs

- 5-30-73 Filed motion to stay the mandate, with p/s (& in 30934)
- 6- 1-73 Filed affidavit in opposition, with p/s (& in 30934)
- 6- 5-73 Filed motion to disallow costs, with p/s
- 6-18-73 Filed order granting motion to stay issuance of mandate and entry of itemized and verified bill of costs, etc. to 7-30-73; no bond will be required pending application to Supreme Court for certiorari
- 6-18-73 Filed order denying motion to disallow certain items of b/costs
- 8- 2-73 Filed notice of substitution of attorneys: Carter, Ledyard & Milburn are substituted as counsel DeCoppet & Doremus in place and stead of Kelley, Drye, Warren, Clark, Carr & Ellis
- 8- 2-73 Filed notice of filing of petition for writ of certiorari (SC#73-203)
- 10-17-73 Filed certified copy of order of Supreme Court granting petition for writ of certiorari (& in 30934)

[SEAL]

A. DANIEL FUSARO
Clerk

COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiff, by his attorneys, Laventhall & Zicklin, Esqs., complaining of defendants on behalf of himself and all other purchasers and sellers of "odd-lots" on the defendant New York Stock Exchange similarly situated, alleges

*As a First Cause of Action Against Defendants
Carlisle & Jacquelin and DeCoppet & Doremus:*

1. That this first cause of action arises under the Sherman Antitrust Act, §1, 15 U.S.C. §1.

2. That the jurisdiction of this Court is based upon the Clayton Antitrust Act, §4, 15 U.S.C. §15.

3. That at all times herein mentioned defendant New York Stock Exchange was and still is an unincorporated association which constitutes, maintains and provides a market place and facilities for bringing together purchasers and sellers of securities and for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood; said defendant New York Stock Exchange is registered as a national securities exchange pursuant to the Securities Exchange Act of 1934, §6, 15 U.S.C. §78f.

4. That plaintiff is an investor who, from time to time, and since at least 1960, has bought and sold stock registered on said defendant New York Stock Exchange in blocks of less than the ordinary unit of trading, which unit of trading

is, in most cases, one hundred (100) shares; each such block is referred to herein as an "odd-lot."

5. That plaintiff brings this action on behalf of himself and representatively on behalf of all purchasers and sellers of odd-lots on said defendant New York Stock Exchange. Plaintiff's claim and the claims of such persons involve common questions of law and fact and common relief is sought herein. Such persons are so numerous as to make it impossible to bring them all before the Court. Plaintiff will fairly insure the adequate representation of all such persons.

6. That at all times herein mentioned defendants Carlisle & Jacquelin and DeCoppet & Doremus were and still are limited partnerships under New York Partnership Law, Article 8, and member firms of said defendant New York Stock Exchange; each of said defendants Carlisle & Jacquelin and DeCoppet & Doremus is a registered odd-lot dealer on said defendant New York Stock Exchange and, as such, each buys and sells odd-lots for its own account.

7. That said defendants Carlisle & Jacquelin and DeCoppet & Doremus together handle, and have in the past handled, approximately ninety-nine (99%) percent of all odd-lot transactions on said defendant New York Stock Exchange.

8. That the odd-lot transactions of plaintiff and of those on whose behalf plaintiff brings this action have been executed with said defendants Carlisle & Jacquelin and DeCoppet & Doremus.

9. That at all times herein mentioned for the defendants Carlisle & Jacquelin and DeCoppet & Doremus did and each still does exact a charge known as a "differential," which it causes to enter into the price of the stock purchased

by or sold to plaintiff and those on whose behalf plaintiff brings this action.

10. That such differential is now twelve and one-half ($12\frac{1}{2}\%$) cents per share on all stocks selling below forty (\$40) dollars per share and twenty-five (25%) cents per share on all stocks selling at and above forty (\$40) dollars per share.

11. That such differential has been established, increased and maintained by said defendants Carlisle & Jacquelin and DeCoppet & Doremus in conspiracy and combination with each other and with principal regional stock exchanges.

12. That said conspiracy and combination are in restraint of trade or commerce among the several states and, as such, are illegal under the Sherman Antitrust Act, §1, 15 U.S.C. §1.

13. That as a result of said conspiracy and combination, such differential is and has been greater than it would have been under free competitive conditions.

14. That as a result of such conspiracy and combination, the profits of said defendants Carlisle & Jacquelin and DeCoppet & Doremus have been excessive, and plaintiff and those represented by plaintiff have been damaged by paying more than they otherwise would have been paying for odd-lot purchases and receiving less than they otherwise would have received for odd-lot sales.

*As a Second Cause of Action Against Defendants
Carlisle & Jacquelin and DeCoppet & Doremus:*

15. That this second cause of action arises under the Sherman Antitrust Act, §2, 15 U.S.C. §2.

16. Plaintiff repeats and re-alleges paragraphs numbered "2" through "14", both inclusive.

17. That said defendants Carlisle & Jacquelin and DeCoppet & Doremus have monopolized, and have combined and conspired to monopolize, dealings in odd-lot transactions in stocks listed on the New York Stock Exchange in violation of the Sherman Antitrust Act, §2, 15 U.S.C. §2.

18. That as a result of such monopolization, the aforesaid differential has been established, increased and maintained by said defendants Carlisle & Jacquelin and DeCoppet & Doremus.

19. That as a result of such monopolization, the differential is and has been greater than it would have been under free competitive conditions.

20. That as a result of such monopolization, the profits of said defendants Carlisle & Jacquelin and DeCoppet & Doremus have been excessive, and plaintiff and those whom plaintiff represents have been damaged by paying more than they otherwise would have had to pay for odd-lot purchases and receiving less than otherwise they would have received for odd-lot sales.

*As a Third Cause of Action Against Defendant
New York Stock Exchange:*

21. That this third cause of action arises under the Securities Exchange Act of 1934, §§6(b), 6(d), and 19(a), 15 U.S.C. §§78f(b), 78f(d), and 78s(a).

22. That this jurisdiction of the Court is based upon the Securities Exchange Act, §27, 15 U.S.C. §78aa.

23. Plaintiff repeats and re-alleges paragraphs numbered "1" through "15", both inclusive, and paragraphs numbered "17" through "20", both inclusive.

24. That the conduct of said defendants Carlisle & Jacquelin and DeCoppet & Doremus as described above is and has been conduct inconsistent with just and equitable principles of trade.

25. That pursuant to the Securities Exchange Act of 1934, §§6(b), 6(d) and 19(a), 15 U.S.C. §§78f(b), 78f(d) and 18s(a), said defendant New York Stock Exchange is required to adopt and enforce rules prohibiting conduct inconsistent with just and equitable principles of trade and rules insuring fair dealing and the protection of investors.

26. That said Securities Exchange Act of 1934, §19(b), 15 U.S.C. §78s(b), recognizes the jurisdiction of national securities exchanges over odd-lot differentials.

27. That notwithstanding the aforesaid statutory provisions, said defendant New York Stock Exchange, aware of the conduct of said defendants Carlisle & Jacquelin and DeCoppet & Doremus, has failed and refused to take any action preventing said defendants Carlisle & Jacquelin and DeCoppet & Doremus from imposing the aforesaid differential on plaintiff and those represented by plaintiff.

28. That as a result of the failure and refusal of said defendant New York Stock Exchange to take action, the differential is and has been greater than it would have been had said defendant New York Stock Exchange exercised its regulatory authority to eliminate and prevent conduct inconsistent with just and equitable principles of trade and to insure fair dealings and the protection of investors.

29. That as a result of such failure and refusal, the profits of said defendants Carlisle & Jacquelin and DeCoppet & Doremus have been excessive, and plaintiff and those represented by plaintiff have been damaged by paying more than they otherwise would have had to pay for

odd-lot purchases and receiving less than they otherwise would have received for odd-lot sales.

WHEREFORE, plaintiff demands judgment:

A. Directing defendants Carlisle & Jacquelin and De-Coppet & Doremus to pay treble damages to plaintiff and to all members of the class represented by plaintiff in such amount as may be established upon trial of this action.

B. Directing defendant New York Stock Exchange to pay damages to plaintiff and to all members of the class represented by plaintiff in such amount as may be established upon trial of this action.

C. Directing defendants Carlisle & Jacquelin and De-Coppet & Doremus to establish a fund in an amount equal to treble that portion of the differential collected in the past which has been excessive.

D. Enjoining defendants Carlisle & Jacquelin and De-Coppet & Doremus from any further violations of the Sherman Antitrust Act, §§1 and 2, and from collecting any further excessive differentials.

E. Directing defendant New York Stock Exchange to regulate and reduce the amount of the differential and to take into account in such regulation the amount by which the differential has been excessive in the past.

F. In favor of plaintiff for costs and expenses of this action, including reasonable counsel and accounting fees.

G. For such other and further relief as may be just.

Laventhall & Zicklin
Attorneys for Plaintiff

ANSWER OF DEFENDANT CARLISLE & JACQUELIN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendant, Carlisle & Jacquelin, by its attorneys, Carter, Ledyard & Milburn, for its answer to the complaint—

*With Respect to the Alleged
First Cause of Action*

1. Denies the allegations of Paragraph 1, except admits that the first alleged cause of action purportedly arises under the Sherman Antitrust Act, Section 1, 15 U.S.C. §1.
2. Denies the allegations of Paragraph 2, except admits that the jurisdiction of this Court is purportedly based upon the Clayton Antitrust Act, Section 4, 15 U.S.C. §15.
3. Admits the allegations of Paragraph 3.
4. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 4, except admits that the ordinary unit of trading in most cases is 100 shares, and that blocks of less than 100 shares are in most cases referred to as "odd-lots."
5. Denies the allegations of Paragraph 5 except admits plaintiff brings this action on behalf of himself and purports to bring this action representatively on behalf of all purchasers and sellers of odd-lots on the New York Stock Exchange and admits that such persons are so numerous as to make it impossible to bring them all before the court.
6. Admits the allegations of Paragraph 6.

7. Lacks knowledge or information sufficient to form a belief with respect to the truth of the allegations of Paragraph 7.

8. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 8.

9. Denies the allegations of Paragraph 9.

10. Denies the allegations of Paragraph 10.

11. Denies the allegations of Paragraph 11.

12. Denies the allegations of Paragraph 12.

13. Denies the allegations of Paragraph 13.

14. Denies the allegations of Paragraph 14.

*With Respect to the Second Alleged
Cause of Action*

15. Denies the allegations of Paragraph 15 except admits that the second alleged cause of action purportedly arises under the Sherman Antitrust Act, Section 2, 15 U.S.C. §2.

16. Repeats and realleges its answers to Paragraphs 2 through 14.

17. Denies the allegations of Paragraph 17.

18. Denies the allegations of Paragraph 18.

19. Denies the allegations of Paragraph 19.

20. Denies the allegations of Paragraph 20.

*For a First Defense to the First and Second
Alleged Causes of Action*

21. The matters alleged fail to state a claim upon which relief can be granted.

*For a Second Defense to the First and Second
Alleged Causes of Action*

22. Alleges that the rights of action, if any, as set forth in the first and second alleged causes of action are barred by laches, estoppel, waiver and acquiescence.

*For a Third Defense to the First and Second
Alleged Causes of Action*

23. The first and second alleged causes of action did not accrue within the time limited by 15 U.S.C., §15b.

WHEREFORE, defendant Carlisle & Jacquelin demands judgment dismissing the complaint, together with the costs and disbursements of this action.

Carter, Ledyard & Milburn

By Devereux Milburn
Attorneys for Defendant,
Carlisle & Jacquelin

ANSWER OF DEFENDANT DeCOPPET & DOREMUS**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK****[SAME TITLE]**

Defendant DeCoppet & Doremus, by its attorneys Kelley Drye Newhall Maginnes & Warren, as and for its answer to the complaint, alleges:

FIRST: It denies each and every allegation contained in paragraphs 1 and 2 of the complaint.

SECOND: It denies each and every allegation contained in paragraph 3 of the complaint, except that it admits that at all times mentioned in the complaint defendant New York Stock Exchange was and still is an unincorporated association which constitutes, maintains and provides a market place and facilities for bringing together purchasers and sellers of securities listed thereon and for otherwise performing with respect to such securities the functions commonly performed by a stock exchange as that term is generally understood; and it further admits that defendant New York Stock Exchange is registered as a national securities exchange pursuant to the Securities Exchange Act of 1934, §6, 15 U.S.C. §78f.

THIRD: It denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 4 of the complaint.

FOURTH: It denies each and every allegation contained in paragraph 5 of the complaint, except that it admits that all purchasers and sellers of odd-lots on the defendant New York Stock Exchange are so numerous as to make it impossible to bring them all before the Court.

FIFTH: It denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 7 and 8 of the complaint.

SIXTH: It denies each and every allegation contained in paragraphs 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 of the complaint.

*First Defense to the First and Second
Causes of Action:*

SEVENTH: The first and second causes of action, if any, alleged in the complaint fail to state a claim upon which relief can be granted.

*Second Defense to the First and Second
Causes of Action:*

EIGHTH: Plaintiff and those on whose behalf he purports to bring this action knew of and acquiesced in the procedures and practices by which purchases and sales of stock in odd-lots were made and effected and, accordingly, are estopped and should not be heard now to complain thereof.

*Third Defense to the First and Second
Causes of Action:*

NINTH: Any claim against this defendant based on acts occurring more than four years prior to the commencement of this action is barred by the provisions of Section 4 B of the Clayton Act, 15 U.S.C. §15 b.

WHEREFORE defendant DeCoppet & Doremus demands judgment dismissing the complaint, together with the costs and disbursements of this action.

Kelley Drye Newhall Maginnes & Warren

By: Bud G. Holman

A Member

Attorneys for defendant

DeCoppet & Doremus

**ANSWER OF DEFENDANT NEW YORK STOCK
EXCHANGE**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

[SAME TITLE]

Defendant New York Stock Exchange (hereinafter sometimes called "the Exchange"), by its attorneys, Milbank, Tweed, Hadley & McCloy, for its answer to the complaint:

1. Denies each and every allegation contained in paragraphs 1 and 2, except admits that the first cause of action purportedly arises under, and the jurisdiction of this Court with respect thereto is purportedly based on, the statutory provisions referred to.

2. Denies each and every allegation contained in paragraph 3 except admits that at all times mentioned in the complaint the Exchange was and is an unincorporated association which constitutes, maintains and provides a market place and facilities for bringing together purchasers and sellers of securities listed on the Exchange and for otherwise performing with respect to such securities the functions commonly performed by a stock exchange as that term is generally understood; and, further, admits that the Exchange is registered as a national securities exchange pursuant to the Securities Exchange Act of 1934, §6, 15 U.S.C. §78f.

3. Denies that it has any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 4, except admits that the

unit of trading in stocks on the Exchange is, in most cases, 100 shares.

4. Denies each and every allegation contained in paragraph 5, except admits that plaintiff purports to bring the action on behalf of himself and representatively on behalf of all purchasers and sellers of odd-lots on the New York Stock Exchange and that such persons are so numerous as to make it impossible to bring them all before the Court.

5. Denies that it has any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraphs 7 and 8.

6. Denies each and every allegation contained in paragraphs 9, 10, 11, 12 and 13.

7. Denies each and every allegation contained in paragraph 14, except denies that it has any knowledge or information as to what, if anything, has been paid or received by plaintiff or by those purportedly represented by plaintiff.

8. Denies each and every allegation contained in paragraph 15, except admits that the second cause of action purportedly arises under the statutory provision referred to.

9. Denies each and every allegation contained in paragraphs 17, 18 and 19.

10. Denies each and every allegation contained in paragraph 20, except denies that it has any knowledge or information as to what, if anything, has been paid or received by plaintiff or by those purportedly represented by plaintiff.

11. Denies each and every allegation contained in paragraphs 21 and 22, except admits that the third cause of action purportedly arises under, and the jurisdiction of this Court with respect thereto is purportedly based on, the statutory provisions referred to.

12. Denies each and every allegation contained in paragraph 24.

13. Denies each and every allegation contained in paragraphs 25 and 26, except refers to the statutory provisions referred to therein for the full and complete terms thereof.

14. Denies each and every allegation contained in paragraphs 27 and 28.

15. Denies each and every allegation contained in paragraph 29, except denies that it has any knowledge or information as to what, if anything, has been paid or received by plaintiff or by those purportedly represented by plaintiff.

For a First Defense Alleges:

16. The third alleged cause of action fails to state a claim upon which relief can be granted.

And for a Second Defense Alleges:

17. Any claim against the Exchange under the third alleged cause of action is barred by the Statute of Limitations.

WHEREFORE, defendant New York Stock Exchange demands judgment dismissing the complaint, with costs.

Milbank, Tweed, Hadley & McCloy

By: s/ William E. Jackson
(A Member of the Firm)

**AFFIDAVIT OF DEAN WITTER, JR., SWORN TO
JUNE 21, 1966****UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK****[SAME TITLE]**

State of New York)
County of New York) ss.:

DEAN WITTER, JR., being sworn, says:

I am a general partner in Dean Witter & Co., members of the New York Stock Exchange and other securities exchanges, am in charge of its Eastern Division, and a member of its Executive Committee. The firm consists of more than seventy general partners and approximately forty limited partners. It is divided into four Divisions: the Pacific Northern Division (headquarters in San Francisco and branches in California, Honolulu, Oregon, Utah and Washington), the Pacific Southern Division (headquarters in Los Angeles and branches in California and Arizona), the Eastern Division (headquarters in New York and branches in Boston and Philadelphia) and the Midwest Division (headquarters in Chicago and branches in Iowa, Indiana, Missouri, Illinois and Nebraska). We have over fifty offices throughout the United States and Hawaii. Each month the firm sends out approximately 70-80,000 customers statements to customers throughout the United States. We also do a considerable volume of business with banks and institutions in Europe, representing many individual investors there. In addition, we do a large business with institutions in Canada.

Odd-lot transactions may be executed for an overwhelmingly large proportion of our customers, at one time or

another. While institutions and large investors transactions are predominantly in round-lots (i.e., 100-share units), almost any account can require odd-lot transactions as a result of stock splits, dividends, etc., which put odd lots of stock into their accounts. For example, each customer who, three months ago held 100 shares of IBM stock, now has 150 shares, a round-lot and an odd-lot. In order to bring their holdings to an even multiple of 100, many of them will either buy or sell 50 shares on the odd-lot market.

Thus there is no ready way to separate odd-lot customers from round-lot customers. To determine which customers had odd-lot transactions recently would require sorting of some (approximately) 3,400,000 names of customers, which would include defunct accounts, persons who have moved from their previous address, persons who had odd-lot transactions only in certain months, customers who may have only executed a single transaction through us, and the like. Under present conditions we are executing over 1200 odd-lot transactions on the New York Stock Exchange daily.

Our customers themselves are of many types. As well as for individual trading for their own accounts, we act as brokers for banks, fiduciaries, investment funds, mutual funds, trust funds, investment counsellors (acting under powers of attorney), business corporations, insurance companies, pension funds, trusts, investment clubs, and many others. The investment aims, degrees of market sophistication and knowledge, frequency of transactions, types of securities negotiated, and prices at which the transactions are executed (whether above or below the odd-lot differential) take almost as many different forms as there are different customers.

Probably the bulk (median) of the business comes from individuals earning approximately \$15,000 per year, and these accounts are very apt to be buying odd-lots, partic-

ularly if they are saving or building an investment program out of income. Odd-lot buyers may purchase new issues as well as market issues; and they may buy as traders looking to rapid turnover of securities with a relatively higher degree of speculation (and a predominant interest in price fluctuation), or as investors (looking to the long-term trend of stock values over the years rather than the mechanical costs of purchase or sale). The in-and-out trader must weigh the cost of commissions, odd-lot differential and taxes more carefully than an investor, upon whom the effect of these less frequently incurred costs is hardly noticed.

Thus different classes of customers have interests which are affected differently (and in some cases, only negligibly) by the odd-lot differential. Those engaged in arbitrage—as in the case of those who buy the stock of one of two companies about to merge while selling the stock of the other company short—stand on a different footing from other odd-lot customers. If their short sales are made in the odd-lot market, it is for the purpose of obtaining ready buyers (the odd-lot dealers) on sales triggered by round-lot purchases. These are artificial transactions designed for arbitrage, and quite different from other customers.

The types of orders entered for odd-lots also vary across a wide range. The order may be entered as agent or as principal; it may be long or short; it may require immediate execution at the market price; it may be a "limit" order (i.e., at a prescribed price); it may be a "day" order (which expires if not filled on the day entered) or may be good for a week, or good until cancelled (an "open" order); it may be a "stop loss" order, which becomes a market order when a specified price is reached; or it may require a purchase or sale upon the closing bid or offer (which is used where volume in the stock is negligible

and a sale or purchase imperative). It is apparent that various of these types of orders require more attention to be devoted to them by the broker and by the odd-lot dealer than others do. A short sale requires more policing to be sure that it complies with New York Stock Exchange rules and with the securities laws. An order good till cancelled, or good for a specified time, is held open upon the books of the dealer and must be watched. The more complicated and sophisticated orders thus demand a great deal more handling, are much more expensive to execute, and increase the possibilities of error over the simpler forms of order. Thus considerably more or less service may be required for various types of orders, although the same commission and the same odd-lot differential is charged for each.

With respect to limit orders, in the majority of cases the customer sustains no impact whatever of the odd-lot differential. The limit order directs that the stock be sold (or bought) to yield a specified price (or cost) to the customer. If the order is to sell at 20, for example, the transaction will be executed at $20\frac{1}{8}$. While the odd-lot dealer obtains a trading advantage of $\frac{1}{8}$ of a point, the customer receives the 20 price he stipulated.

A customer who has a margin account or who deposits his securities with our firm has little interest in prompt delivery following execution of his transaction, while a customer who holds his securities himself (and may require them for use in another transaction) has a high interest in prompt delivery. Promptness of delivery is supplied by the odd-lot dealers at considerable cost to them, including the borrowing of stock where necessary to effect it.

Despite the large number and variety of odd-lot customers transactions which we have handled over the years, I am aware of no specific complaint made by a customer regarding the amount of the odd-lot differential. For the

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Affidavit of Dean Witter, Jr.

reasons stated above, it is most unlikely that there could be any unanimity in the nature of any complaint, for the impact of the differential differs so widely between different types of customers and different types of orders.

Dean Witter, Jr.

(Sworn to June 21, 1966.)

**AFFIDAVIT OF BAYARD DOMINICK
SWORN TO JUNE 23, 1966**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

BAYARD DOMINICK, being sworn, says:

I am an Executive Vice President of Dominick & Dominick, Incorporated, members of the New York Stock Exchange and of the American, Midwest, Pacific and Toronto Stock Exchanges. Our head office is at 14 Wall Street, New York City; we have branch offices not only in New York City but also in Buffalo, Chicago, Los Angeles, Portland, San Francisco and Seattle. We will soon open a branch office in Houston, and our affiliate Dominick Corporation of Canada (with offices in Montreal and Toronto) will soon open an office in Vancouver. Dominick & Dominick, Ltd. in London, England is another affiliate, as well as Dominick & Dominick, Underwriting Ltd. and we have a transmittal office in Basle, Switzerland.

Our active customers number about 7,000, and we have another approximately 13,000 occasional customers. Ours is one of the biggest correspondent firms on the New York Stock Exchange (a "correspondent firm" executes and clears transactions for out-of-town member firms). As an approximation, I would estimate that perhaps 60% of the volume of shares bought and sold by Dominick & Dominick Incorporated as brokers on the New York Stock Exchange is executed on behalf of our out-of-town correspondents.

The proportion of odd-lot transactions executed for correspondents is probably higher, than is done by Dominick & Dominick. During the week (five trading days) of June 6-10, 1966, our office records show that we executed 1,608 odd-lot transactions. The number of Dominick & Dominick customers having odd-lot transactions in that week was 381. Transactions executed on behalf of correspondents numbered 1,227. The total volume of odd-lot shares bought and sold through our firm in that week was 43,809 shares. We acted on behalf of 14 correspondents, all of whom are located out of town, and 13 of whom are located in other states. We cannot identify the individual customers for whom the correspondents execute orders through Dominick & Dominick. Dominick & Dominick's customers extend throughout the United States and many other parts of the world.

Probably every customer has, at one time or another, some odd lots of stock in his portfolio as a result of stock splits and stock dividends, and thus may engage in odd-lot transactions to round out his holding, if for no other purpose. As a matter of fact, more and more people holding investment accounts acquire and sell odd lots of stock, for they tend to invest in even units of dollars rather than in even units of stock.

The majority of our clients are investors; we have very few speculative accounts. Our customers include among others individual corporations, pension funds, mutual funds, closed-end investment funds, banks (domestic and European), and every category of individual (mostly in high-grade investment accounts of \$100,000 or more). Our individual customers include presidents and executives of corporations, professionals such as lawyers and doctors, retired business men, shop owners, individual bankers, foreigners and United States nationals, children (through trusts), estates, and many others.

I have practically never heard a complaint respecting the odd-lot differential. Most of Dominick & Dominick's customers simply do not care about the differential. It does not make much difference from an investment point of view whether the price of the stock is above or below the break-point. An active trader (as opposed to an investor) is affected by the odd-lot differential, for he is working for every eighth and quarter-point, usually on margin to the greatest extent possible, so every cost of interest, commission, taxes and differential does affect him. That is not true of the purchaser who buys for investment, for the costs of executing any particular investment are small in relation to the money involved, and his interest lies in capital gains and dividends.

The prompt deliveries of stock which we receive from the odd-lot dealers is an important matter to those of our customers who require delivery of their stocks to them (the majority of our accounts leave it on deposit with us and we hold, as a rough guess, over \$750,000,000 of customers' securities). Our "Failures to Receive and Deliver" approximate \$20,000,000. If a customer wants his stock it must be delivered to him; these customers get the benefit of the prompt service of the odd-lot dealer.

There is no question that stop-loss orders, short sales, and limited orders (such as "good till cancelled") take more time to handle than straight market orders. We have to set up safeguards to see that they are properly handled, and so must the odd-lot dealers. Regardless of the type of order, the odd-lot differential remains the same.

BAYARD DOMINICK

(Sworn to June 23, 1966.)

**AFFIDAVIT OF JOSEPH F. NEIL, JR.,
SWORN TO JULY 1, 1966**

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

JOSEPH F. NEIL, JR., being duly sworn, deposes and says:

1. I am a Partner of Goodbody & Co. (hereinafter together with any predecessor firms sometimes called "my Firm"), have been associated with my Firm or its predecessors for upwards of twelve (12) years and am familiar with the facts and circumstances hereinafter set forth.

2. My Firm for many years past has been and still is a member organization of New York Stock Exchange and has been, and still is engaged in the business of buying and selling for its customers shares of stock of corporations whose stocks are listed on the New York Stock Exchange. Our main office is located at 2 Broadway, New York, New York and we have eighty-three (83) branch offices located in all parts of the continental United States.

3. My Firm has in excess of One Hundred Fifty Thousand (150,000) customers located throughout the United States, and in many foreign countries. These customers include individuals and such diverse entities as savings banks, educational institutions, foundations, religious groups, non-profit organizations, life and other insurance companies, investment clubs, mutual funds and closed-end investment companies, non-financial corporations, business corporations, partnerships, personal holding companies, and non-

bank-administered estates, guardianships, pension funds, personal trusts, and profit-sharing plans, as well as governmental bodies. While many of my Firm's customers are investors, a number are traders who buy and sell securities with a great deal of frequency.

4. The activities of my Firm as broker in buying or selling stock for the account of its customers involve either the purchase or sale of stock in the standard unit of trading on the New York Stock Exchange which, except with respect to certain inactive stocks, is one hundred shares or multiples thereof (a "round-lot" transaction) or in units of less than the standard unit of trading—one to ninety-nine shares (an "odd-lot" transaction). Many of our customers have my Firm execute for them both round-lot and odd-lot transactions. A very substantial part of my Firm's business for these customers involves odd-lot transactions. I have been informed and believe that in the four year period from May 1, 1962 through April 30, 1966, my Firm arranged for its customers Eight Hundred Sixty-nine Thousand Four Hundred Eighty-three (869,483) separate odd-lot purchases or sales. The financial resources of odd-lot customers range from those of individuals of modest means to multi-million dollar corporations.

5. My Firm's customers engage in many types of odd-lot transactions. Thus, my Firm has handled Market Orders (orders to buy or sell at the market), Limited Orders and Stop Loss Orders (orders to buy or sell at a prescribed price), Day Orders (orders which remain in force only through the day in which it was entered), Open Orders (orders kept in force beyond day of entry), Good Until Cancelled (G.T.C.) Orders (orders kept in force until cancelled), Stop Limited Orders (orders to buy or sell at a certain price with a specified limit), Orders to Buy on Offer-

Sell on Bid (orders that do not require a triggering round-lot transaction), Orders to Buy or Sell on Close (orders to buy or sell at the closing round-lot bid or offer price), Basis Price Orders (orders to buy or sell on prices established by the odd-lot dealers where there is no round-lot transaction), Alternative Orders (a group of orders entered at the same time, where the execution of one order automatically cancels the other or others), Contingent Orders (a combination of orders the execution of one being contingent upon the execution of the other) and Scale Orders (orders to buy or sell two or more lots of the same stock at designated price variations). Some of our customers sold "short" (sold stock that they did not then own) or maintained "long" positions in particular stocks. Many of our customers purchase stocks through the Monthly Investment Plan. Some of our customers trade for cash and some on margin. The dealings of our odd-lot customers are extremely varied and take many forms and are made for many different objectives and purposes.

6. The stocks in which my Firm's odd-lot customers deal embrace nearly all of the approximately One Thousand Four Hundred Thirty (1,430) active issues, as well as the approximately Two Hundred Ten (210) inactive issues listed on the New York Stock Exchange. These stocks vary widely in price. As can be seen from an examination of the financial pages of most daily newspapers, the New York Stock Exchange listed stocks selling for as little as two dollars a share and as high as several hundred dollars a share.

JOSEPH F. NEIL, JR.

(Sworn to July 1, 1966.)

**AFFIDAVIT OF EDWARD I. O'BRIEN
SWORN TO JULY 1, 1966**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

EDWARD I. O'BRIEN, being duly sworn, deposes and says:

1. I am a Vice President of Bache & Co. Incorporated (hereinafter together with any predecessor firms sometimes called "my Firm"), have been associated with my Firm or its predecessors for upwards of ten (10) years and am familiar with the facts and circumstances hereinafter set forth.

2. My Firm for many years past has been and still is a member organization of New York Stock Exchange and has been, and still is, engaged in the business of buying and selling for its customers shares of stock of corporations whose stocks are listed on the New York Stock Exchange.

3. My Firm has in excess of 100,000 customers located throughout the United States, and in many foreign countries. These customers include individuals and such diverse entities as savings banks, educational institutions, foundations, religious groups, non-profit organizations, life and other insurance companies, investment clubs, mutual funds and closed-end investment companies, non-financial corporations, business corporations, partnerships, personal

holding companies, and non-bank-administered estates, guardianships, pension funds, personal trusts, and profit-sharing plans, as well as governmental bodies. While many of my Firm's customers are investors, a number are traders who buy and sell securities with a great deal of frequency.

4. The activities of my Firm as broker in buying or selling stock for the account of its customers involve either the purchase or sale of stock in the standard unit of trading on the New York Stock Exchange which, except with respect to certain inactive stocks, is one hundred shares of multiples thereof (a "round-lot" transaction) or in units of less than the standard unit of trading—one to ninety-nine shares (an "odd-lot" transaction). Many of our customers have my Firm execute for them both round-lot and odd-lot transactions. A very substantial part of my Firm's business for these customers involves odd-lot transactions. I have been informed and believe that in the four year period from May 1, 1962 through April 30, 1966, my Firm arranged for its customers 1,429,845 separate odd-lot purchases or sales. The financial resources of odd-lot customers range from those individuals of modest means to multi-million dollar corporations.

5. My Firm's customers engage in many types of odd-lot transactions. Thus, my Firm, has handled Market Orders (order to buy or sell at the market), Limited Orders and Stop Loss Orders (order to buy or sell at a prescribed price), Day Orders (order which remains in force only through the day in which it was entered), Open Orders (order kept in force beyond the day of entry), Good Until Cancelled (G.T.C.) Orders (orders kept in force until cancelled), Stop Limited Orders (orders to buy or sell at a certain price with a specified limit) Order to Buy on Offer

—Sell on Bid (orders that do not require a triggering round-lot transaction), Orders to Buy or Sell on Close (order to buy or sell at the closing round-lot bid or offer price), Basis Price Orders (order to buy or sell on prices established by the odd-lot dealers where there is no round-lot transaction), Alternative Orders (a group of orders entered at the same time, where the execution of one order automatically cancels the other or others), Contingent Orders (a combination of orders the execution of one being contingent upon the execution of the other) and Scale Orders (orders to buy or sell two or more lots of the same stock at designated price variations). Some of our customers sold "short" (sold stock that they did not then own) or maintained "long" positions in particular stocks. Many of our customers purchase stocks through the Monthly Investment Plan. Some of our customers trade for cash and some on margin. The dealings of our odd-lot customers are extremely varied and take many forms and are made for many different objectives and purposes.

6. The stocks in which my Firm's odd-lot customers deal embrace nearly all of the approximately 1430 active issues as well as the approximately 210 inactive issues listed on the New York Stock Exchange. These stocks vary widely in price. As can be seen from an examination of the financial pages of most daily newspapers, the New York Stock Exchange listed stocks selling for as little as two dollars a share and as high as several hundred dollars a share.

EDWARD I. O'BRIEN

(Sworn to July 1, 1966.)

**AFFIDAVIT OF WILLIAM D. FLEMING
SWORN TO JUNE 30, 1966**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

WILLIAM D. FLEMING, being duly sworn, deposes and says:

1. I am the President of Walston & Co., Inc. a Delaware Corporation (hereinafter together with any predecessor firms sometimes called "my Firm"), havee beene associated with my Firm or its predecessors for upwards of twenty (20) years and am familiar with the facts and circumstances hereinafter set forth.

2. My Firm for many years past has been, and still is, a member organization of New York Stock Exchange and has been, and still is, engaged in the business of buying and selling for its cusotmers shares of stock of corporations whose stock is listed on the New York Stock Exchange. While my Firm's main office is in New York City, we have ninety other offices. These are scattered throughout the continental United States, with thirty-two on the West Coast, twenty-five on the East Coast, seventeen in the Midwest and thirteen in Florida. In addition we have two offices in Hawaii and one in Switzerland.

3. My Firm has in excess of Three Hundred Thousand (300,000) customers located throughout the United States, and in many foreign countries. Of these about One Hun-

dred Thousand (100,000) are active customers while the rest have only occasional transactions. These customers include individuals and such diverse entities as savings banks, educational institutions, foundations, religious groups, non-profit organizations, life and other insurance companies, investment clubs, mutual funds and closed-end investment companies, non-financial corporations, business corporations, partnerships, personal holding companies, and non-bank-administered estates, guardianships, pension funds, personal trusts, and profit-sharing plans, as well as governmental bodies. While many of my Firm's customers are investors, a number are traders who buy and sell securities with a great deal of frequency.

4. The activities of my Firm as broker in buying or selling stock for the account of its customers involve either the purchase or sale of stock in the standard unit of trading on the New York Stock Exchange, which, except with respect to certain inactive stocks, is one hundred shares or multiples thereof ("round-lot" transaction) or in units of less than the standard unit of trading—one to ninety-nine shares (an "odd-lot" transaction). Many of our customers have my Firm execute for them both round-lot and odd-lot transactions. A very substantial part of my Firm's business for these customers involves odd-lot transactions. I have been informed and believe that in the four year period from May 1, 1962 through April 30, 1966, my Firm arranged for its customers Eight Hundred One Thousand Eight Hundred Eighty-Five (801,885) separate odd-lot purchases or sales. The financial resources of odd-lot customers range from those of individuals of modest means to multi-million dollar corporations.

5. My Firm handled for our customers many different types of odd-lot transactions. Among these were Market Orders (order to buy or sell at the market), Limited Orders

and Stop Loss Orders (order to buy or sell at a prescribed price), Day Orders (orders which remain in force only through the day in which they were entered), Open Orders (orders kept in force beyond day of entry), Good Until Cancelled (GTC) Orders (orders kept in force until cancelled), Stop Limited Orders (orders to buy or sell at a certain price with a specified limit), Orders to Buy on Offer—Sell on Bid (orders that do not require a triggering round-lot transaction), orders to Buy or Sell on Close (orders to buy or sell at the closing round-lot price), Basis Price Orders (orders to buy or sell on prices established by the odd-lot dealers where there is no round-lot transaction), and Scale Orders (orders to buy or sell two or more lots of the same stock at designated price variations). Some of our customers sold "short" (sold stock that they did not then own) or maintained "long" positions in particular stocks. Some of our customers trade for cash and some on margin. Many of our customers purchase stocks through the Monthly Investment Plan. The dealings of our odd-lot customers are extremely varied and take many forms and are made for many different objectives and purposes.

6. The stock in which my Firm's odd-lot customers deal embrace nearly all of the approximately One Thousand Four Hundred Thirty (1,430) active issues as well as many of the approximately Two Hundred Ten (210) inactive stocks listed on the New York Stock Exchange. These stocks vary widely in price. As can be seen from an examination of the financial pages of most daily newspapers, the New York Stock Exchange listed stock selling for as little as two dollars a share and as high as several hundred dollars a share.

William D. Fleming

(Sworn to June 30, 1966.)

**AFFIDAVIT OF MATTHEW J. SMITH
SWORN TO JUNE 30, 1966**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

MATTHEW J. SMITH, being duly sworn, deposes and says:

1. I am a vice-president of Merrill Lynch, Pierce, Fenner & Smith Incorporated (hereinafter together with any predecessor firms sometimes called "my Firm"), and Director of its Administrative Division, and I have been associated with my Firm or its predecessors for upwards of 17 years and am familiar with the facts and circumstances hereinafter set forth.

2. My Firm for many years past has been, and still is, a member of New York Stock Exchange and has been, and still is, engaged in the business of buying and selling for its customers shares of stock of corporations whose stocks are listed on the New York Stock Exchange.

3. My Firm has in excess of 700,000 customers located throughout the United States, and in many foreign countries, serviced by 145 offices in the United States and Canada, and 13 offices throughout the rest of the world. These customers include such diverse entities as individuals, institutions, including savings banks, educational institutions, foundations, religious groups, fraternal and other non-profit organizations, life and other insurance companies, labor unions, investment clubs, credit unions, mutual funds and

closed-end investment companies, non-financial corporations, business corporations, partnerships, trustees in bankruptcy, personal holding companies, estates, guardianships, pension funds, employee stock purchase plans, personal trusts, conservatorships, custodians and profit-sharing plans, as well as governmental bodies. While many of my Firm's customers are investors, a number are traders who buy and sell securities with a great deal of frequency.

4. The activities of my Firm as broker in buying or selling stock for the account of its customers involve either the purchase or sale of stock in the standard unit of trading on the New York Stock Exchange, i.e., one hundred shares or multiples thereof (a "round-lot" transaction) or in units of less than the standard unit of trading—one to ninety-nine shares (an "odd-lot" transaction). For the past several years my Firm has handled approximately 20% of the odd-lot business on the New York Stock Exchange. Many of our customers have my Firm execute for them both round-lot and odd-lot transactions. A very substantial part of my Firm's activities for these customers involves odd-lot transactions. I have been informed and believe that in the four year period from January 1, 1962 through December 31, 1965, my Firm arranged for its customers approximately 5,500,000 separate odd-lot purchases or sales (not including transactions in Monthly Investment Plan (hereafter "MIP") accounts). The financial resources of odd-lot customers range from those of individuals of modest means to multi-million dollar corporations.

5. The dealings of our odd-lot customers are extremely varied and take many forms and are made for many different objectives and purposes. My Firm handled Market Orders (orders to buy or sell at the market), Limited Orders and Stop Loss Orders (orders to buy or sell at a pre-

scribed price), Day Orders (orders which remain in force only through the day in which it was entered), Open Orders (orders kept in force beyond day of entry), Good Until Cancelled (G.T.C.) Orders (orders kept in force until cancelled), Stop Limited Orders (orders to buy or sell at a certain price with a specified limit), Orders to Buy on Offer—Sell on Bid (orders that do not require a triggering round-lot transaction), Orders to Buy or Sell on Close (orders to buy or sell at the closing round-lot offer or bid), Basis Price Orders (orders to buy or sell on prices established by the odd-lot dealers where there is no round-lot transaction), Alternative Orders (a group of orders entered at the same time, where the execution of one order automatically cancels the other or others), Contingent Orders (a combination of orders the execution of one being contingent upon the execution of the other) and Scale Orders (orders to buy or sell two or more lots of the same stock at designated price variations). Some of our customers sold “short” (sold stock that they did not then own) or maintained “long” positions in particular stocks. Some of our customers trade for cash and some on margin.

6. Some of our odd-lot customers are individual investors with limited funds who purchase only odd lots of their favorite stocks. Some customers purchase odd lots as they enter the market for the first time, and then purchase round lots as they gain experience and confidence. Other customers who may generally buy and sell round lots may find it necessary on occasion to buy and sell odd lots. Thus, for example, the holder of Standard Oil of Indiana who receives a stock dividend in the form of shares of Standard Oil of New Jersey may sell the Standard Oil of New Jersey stock because he doesn't want to bother holding odd lots. Or the executor of an estate who must raise funds to pay debts, taxes or legacies may sell odd lots to raise only so

much cash as he actually needs, and thereby preserve the balance of the stock holdings for distribution to the legatees. Along the same lines, an executor may buy or sell odd lots in order to have holdings available for equal distribution among the legatees (e.g., an executor with 100 shares of XYZ stock to distribute to 3 legatees might either buy 2 shares or sell 1 share so that each legatee receives the same number of shares).

My Firm has more than half of the approximately 180,000 New York Stock Exchange MIP accounts. By their nature these accounts involve odd lot transactions. Many of our MIP customers also have regular accounts with us, in which some of them often buy and sell in round lots.

A booklet, recently published by the New York Stock Exchange, entitled "New Investors", indicates that the number of minor shareholders has increased from 450,000 in 1962 to 1,280,000 in 1965 (page 6). Many of these minors have acquired their holdings through the various Gifts to Minors statutes, whose use is becoming increasingly popular. Many gifts under the Gifts to Minors acts are small gifts of a few shares to commemorate a birth, baptismal, graduation, confirmation or similar event. It is not likely that the persons making these gifts are concerned with the odd lot differential.

MATTHEW J. SMITH

(Sworn to June 30, 1966.)

**AFFIDAVIT OF EDWIN B. PETERSON
SWORN TO JULY 1, 1966**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

EDWIN B. PETERSON, being sworn, says:

I am a general partner in Francis I. duPont & Co., members of the New York Stock Exchange and other securities exchanges. The firm consists of thirty-eight general partners and approximately fifteen limited partners. Although there are partners in charge of various offices throughout the country, the firm is centrally controlled from the main office at No. One Wall Street, New York City. Our firm maintains 104 offices, included in which are offices in London, Amsterdam, Frankfurt, Lausanne, Beirut, and two in Canada.

I caused a check of our records to be made for the period from January 1, 1966 through May 31, 1966 and found that we mailed statements to an average of 141,307 customers each month. This number does not represent anything like our entire clientele but merely those customers for whom the firm is carrying a position at the time of the mailing—in other words, "open accounts". The total number of the firm's clients would be vastly in excess of this mailing list; I would estimate somewhere between 500,000 and 1,000,000.

For various reasons, including the prevalence of stock splits, stock dividends, etc., a great majority of our cus-

tomers are involved in odd-lot transactions, but there is no way of obtaining exact information in this connection without analyzing the history of each account for the period of time involved. In view of the enormous numbers, this task would be virtually impossible.

During the five months covered by my investigation, the firm averaged 1,932 odd-lot transactions per day on the New York Stock Exchange alone. Almost every conceivable type of customer was involved, as for instance, individuals, banks, fiduciaries (including executors and trustees), custodians under the Gifts to Minors Act, mutual funds, trust funds, investment counsellors (acting under powers of attorney), business partnerships, business corporations, insurance companies, pension funds, trusts, investment clubs, and many others too numerous to list.

There are many different types of orders involved in odd-lot transactions, as for instance, market order, limit order, day order, good for a week, good until cancelled, open door, stop loss order, basis order, money order, etc., etc. My firm handles all of them at one time or another, and each different type of order requires a different type of handling. A money order, for example, involves a customer who calls up and states that he has a definite amount of money and would like to buy as many shares as possible of a certain stock. My firm must ascertain the price of the stock, the brokerage commission, compute the probable differential, and arrange for the disposition of the excess of the money available over the cost of the order.

It is absolutely essential that the odd-lot houses provide for the prompt delivery of stock. A small investor wants to receive his securities as soon as he has put up his money and our firm is equally desirous that he should receive them at once. We feel that it is a good policy for a small investor to receive all the literature, such as proxy statements and

annual statements, which goes out periodically to stockholders and, in addition, it saves the firm the trouble and expense of holding and servicing an inordinate number of small accounts.

The odd-lot differential is accepted by the investor without comment. I do not remember any specific complaints on this subject.

EDWIN B. PETERSON

(Sworn to July 1, 1966.)

**AFFIDAVIT OF DANIEL T. BERGIN
SWORN TO JULY 6, 1966**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK****[SAME TITLE]****State of New York)
County of New York) ss.:****DANIEL T. BERGIN, being duly sworn, deposes and says:**

1. I am a General Partner of Hornblower & Weeks-Hemphill, Noyes (hereinafter together with any predecessor firms sometimes called "my Firm"), having been associated with my Firm for upwards of 40 years and am familiar with the facts and circumstances hereinafter set forth.

2. My Firm for many years past has been and still is, a member organization of New York Stock Exchange and has been, and still is, engaged in the business of buying and selling for its customers shares of stock of corporations whose stocks are listed on the New York Stock Exchange.

3. My Firm has in excess of 100,000 customers, located throughout the United States and in some foreign countries. These customers include individuals and such diverse entities as savings banks, educational institutions, foundations, religious groups, non-profit organizations, life and other insurance companies, investment clubs, mutual funds and closed-end investment companies, non-financial corporations, business corporations, partnerships, personal holding companies, and non-bank-administered estates, guardian-

ships, pension funds, personal trusts, and profit-sharing plans, as well as governmental bodies. While many of my Firm's customers are investors, a number are traders who buy and sell securities with a great deal of frequency.

4. The activities of my Firm as broker in buying or selling stock for the account of its customers involve either the purchase or sale of stock in the standard unit of trading on the New York Stock Exchange which, except with respect to certain inactive stocks, is one hundred shares (a "round-lot" transaction) or multiples thereof or in units of less than the standard unit of trading, namely, one to ninety-nine shares (an "odd-lot" transaction). Many of our customers give my Firm orders to buy or sell both round-lots and odd-lots of stock. A very substantial part of my Firm's business for these customers involves odd-lot transactions. I have been informed and believe that in the four-year period from May 1, 1962 through April 30, 1966, my Firm arranged for its customers in excess of 600,000 separate odd-lot purchases or sales. The financial resources of odd-lot customers range from those of individuals of modest means to multi-million dollar corporations.

5. My Firm has handled for customers many different types of odd-lot transactions. Among these were Market Orders (orders to buy or sell at the market), Limited Orders and Stop Loss Orders (orders to buy or sell at a prescribed price), Day Orders (orders which remain in force only through the day on which it was entered), Open Orders (orders kept in force beyond day of entry), Good Until Cancelled (G.T.C.) Orders (orders kept in force until cancelled), Stop Limit Orders (orders to buy or sell at a certain price with a specified limit), Orders to Buy on Offer—Sell on Bid (orders that do not require a triggering round-lot transaction), Orders to Buy or Sell on Close

(orders to buy or sell at the closing round-lot bid or offer price), Basis Price Orders (orders to buy or sell on prices established by the odd-lot dealers where there is no round-lot transaction), Alternative Orders (a group of orders entered at the same time, where the execution of one order automatically cancels the other or others), Contingent Orders (a combination of orders the execution of one being contingent upon the execution of the other) and Scale Orders (orders to buy or sell two or more lots of the same stock at designated price variations). Some of our customers sold "short" (sold stock that they did not then own) or maintained "long" positions in particular stocks. Some of our customers purchase stock through the Monthly Investment Plan. Some of our customers trade for cash and some on margin. The dealings of our odd-lot customers are extremely varied and take many forms and are made for many different objectives and purposes.

6. The stocks in which my Firm's odd-lot customers deal embrace nearly all of the approximately 1430 active issues, and the approximately 210 inactive issues, listed on the New York Stock Exchange. These stocks vary widely in price. As can be seen from an examination of the financial pages of most daily newspapers, the New York Stock Exchange listed stocks sell for as little as two dollars a share and as high as several hundred dollars a share.

DANIEL T. BERGIN

(Sworn to July 6, 1966.).

**PLAINTIFF'S ANSWERS TO
DEFENDANTS' INTERROGATORIES, VERIFIED ON
JUNE 28, 1966**

(Record pp. 53-63)

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

[SAME TITLE]

Answers of plaintiff Morton Eisen to interrogatories served upon him by defendants on June 17, 1966.

1: My residence address is 15-86 Bell Boulevard, Bay-side, Queens, New York.

2: I am a wholesale shoe sales representative. My business address is 130 West Broadway, New York, New York.

3: The following are the transactions, numbered (i) through (xlvii), in which I engaged during the six years next preceding the filing of the complaint in this action, involving the purchase or sale of an odd-lot of stock on the New York Stock Exchange and the information requested in "(a)" through "(k)" of Interrogatory "3" for each such transaction:

(i) (a)

Raytheon Mfg.

(b)

purchase

(c)

47 $\frac{1}{8}$

(d)

50 shares

(e)

May 19, 1960

(f)

\$28.56

(g)

\$12.50

(h)

To the best of my recollection, with respect to this and all of my other odd-lot transactions, listed below, each such transaction was long and the order under which each was effected (54) was either market or limit, which, in turn, was either a day order, open order or good until cancelled order. However, with respect to each such transaction, I cannot recall whether it was market or limit or any further particulars as to the type of order under which it was effected. Therefore, the foregoing is my answer to interrogatory "3(h)" for all of my transactions listed herein.

(i)

Ira Haupt & Co.

(j)

defendant DeCoppet & Doremus

(k)

own account.

(ii) (a)

Universal Cyclops Steel

(b)

purchase

(c)

31 $\frac{7}{8}$

- (d)
5 shares
- (e)
October 3, 1960
- (f)
\$6.00
- (g)
.625 cents
- (i)
Ira Haupt & Co.
- (j)
Defendant DeCoppet & Doremus
- (k)
Account of Morton Eisen, Custodian for Michael L. Rubinstein, whose address is 2785 Broadway, New York. Michael L. Rubinstein is my stepson.
- (iii) (a)
Diners Club
- (b)
purchase
- (c)
18 $\frac{5}{8}$
- (d)
10 shares
- (e)
October 3, 1960
- (f)
\$6.00

Plaintiff's Answers to Interrogatories

(g)

\$1.25

(i)

Ira Haupt & Co.

(j)

defendant DeCoppet & Doremus

(k)

account of Morton Eisen, Custodian for Michael L. Rubinstein.

(iv) (a)

Pure Oil Co.

(b)

purchase

(c)

32 $\frac{5}{8}$

(d)

5 shares

(e)

October 3, 1960

(f)

\$6.00

(g)

.625 cents

(i)

Ira Haupt & Co.

(j)

defendant DeCoppet & Doremus

(k)

account of Morton Eisen, Custodian for Michael L. Rubinstein.

(v) (a)

American Motors Corp.

(b)

sale

(c)

20½

(d)

65 shares

(e)

April 5, 1961

(f)

\$18.33

(g)

\$8.125

(i)

Cohen, Simonson & Co.

(55) (j)

To my best knowledge, with respect to all odd-lot business, Cohen, Simonson & Co., at the time of this transaction and to this date, dealt and now deals with defendant DeCoppet & Doremus exclusively for six months of each year and with defendant Carlisle & Jacquelin exclusively for the other six monthss of each year (not necessarily consecutive calendar months). However, I do not know which of said two defendants effected this particular transaction.

(k)

own account.

(vi) (a)

International Telephone & Telegraph

A68

Plaintiff's Answers to Interrogatories

- (b)
sale
- (c)
58
- (d)
50 shares
- (e)
April 19, 1961
- (f)
\$31.50
- (g)
\$12.50
- (i)
Cohen, Simonson & Co.
- (j)
My answer is the same as in (v) (j), above
- (k)
own account
- (vii) (a)
Olin Mathieson Chemical
- (b)
sale
- (c)
43
- (d)
50 shares
- (e)
April 27, 1961

(f)

\$26.50

(g)

\$12.50

(i)

Edwards & Hanly was my broker for this and all of my transactions listed in (viii) through (xlvii), below.

(j)

The only information which I have with respect to this interrogatory, is that I have been advised by the account executive in charge of my accounts at Edwards & Hanly that at the time of this transaction and to this date, with respect to all odd-lot business, Edwards & Hanly dealt and now deals with defendant Carlisle & Jacquelin, exclusively. Therefore, the foregoing is my answer to Interrogatory "3(j)" for this and all of my transactions listed in (viii) through (xlvii), below.

(k)

own account.

(viii) (a)

Raytheon Company

(b)

Sale

(c)

37½

(d)

51 shares

(e)

April 27, 1961

A70

Plaintiff's Answers to Interrogatories

(f)

\$23.93

(g)

\$6.375

(k)

own account

(ix) (a)

Standard Kollsman

(b)

sale

(c)

50 $\frac{1}{8}$

(d)

3 shares

(e)

June 2, 1961

(f)

\$6.00

(g)

75 cents

(k)

own account

(56) (x) (a)

Standard Oil Co. (Ohio)

(b)

sale

(c)

53 $\frac{5}{8}$

(d)
2 shares

(e)
October 24, 1961

(f)
\$6.00

(g)
50 cents

(k)
Account of Morton Eisen, Custodian for Mark J. Eisen, whose address is 15-16 Bell Boulevard, Bayside, Queens, New York. Mark J. Eisen is my son.

(xi) (a)
Standard Oil Co. (Ohio)

(b)
sale

(c)
53%

(d)
2 shares

(e)
October 24, 1961

(f)
\$6.00

(g)
50 cents

(k)
Account of Morton Eisen, Custodian for Michael L. Rubinstein.

(xii) (a)

Standard Oil Co. (Ohio)

(b)

sale

(c)

53 $\frac{5}{8}$

(d)

2 shares

(e)

October 24, 1961

(f)

\$6.00

(g)

50 cents

(k)

Account of Morton Eisen, Custodian for Eric A. Eisen, whose address is 15-86 Bell Boulevard, Bayside, Queens, New York. Eric A. Eisen is my son.

(xiii) (a)

American Viscose

(b)

sale

(c)

56 $\frac{5}{8}$

(d)

50 shares

(e)

November 17, 1961

(f)

\$31.16

(g)

\$12.50

(k)

own account

(xiv) (a)

American Viscose

(b)

sale

(c)

54½

(d)

15 shares

(e)

December 6, 1961

(f)

\$13.18

(g)

\$3.75

(k)

own account

(xv) (a)

Avco Corporation

(b)

purchase

(c)

21

(d)

5 shares

A74 *Plaintiff's Answers to Interrogatories*

(e)
June 28, 1962

(f)
\$6.00

(g)
.625 cents

(k)
Account of Morton Eisen, Custodian for Eric A. Eisen.

(57) (xvi) (a)
American Viscose

(b)
sale

(c)
60 $\frac{7}{8}$

(d)
35 shares

(e)
December 31, 1962

(f)
\$26.31

(g)
\$8.75

(k)
own account

(xvii) (a)
Control Data

(b)
purchase

(c)

44 $\frac{5}{8}$

(d)

5 shares

(e)

April 29, 1963

(f)

\$6.00

(g)

\$1.25

(k)

Account of Morton Eisen, Custodian for Eric A. Eisen.

(xviii) (a)

Avco Corporation

(b)

sale

(c)

26 $\frac{3}{8}$

(d)

5 shares

(e)

April 29, 1963

(f)

\$6.00

(g)

.625 cents

(k)

Account of Morton Eisen, Custodian for Eric A. Eisen.

Plaintiff's Answers to Interrogatories

(xix) (a)

Magnavox Co.

(b)

sale

(c)

41 $\frac{5}{8}$

(d)

45 shares

(e)

April 29, 1963

(f)

\$23.73

(g)

\$11.25

(k)

own account.

(xx) (a)

Control Data

(b)

purchase

(c)

45

(d)

8 shares

(e)

April 30, 1963

(f)

\$8.20

(g)

\$2.00

(k)

Account of Morton Eisen, Custodian for Michael L. Rubinstein.

(xxi) (a)

Pure Oil Co.

(b)

sale

(c)

40 $\frac{1}{4}$

(d)

5 shares

(e)

April 30, 1963

(f)

\$6.00

(g)

\$1.25

(k)

Account of Morton Eisen, Custodian for Michael L. Rubinstein.

(58) (xxii) (a)

Universal Cyclops Steel

(b)

sale

(c)

30 $\frac{1}{8}$

A78

Plaintiff's Answers to Interrogatories

(d)

5 shares

(e)

April 30, 1963

(f)

\$6.00

(g)

.625 cents

(k)

Account of Morton Eisen, Custodian for Michael
L. Rubinstein.

(xxiii) (a)

Magnavox Co.

(b)

sale

(c)

41 $\frac{3}{8}$

(d)

55 shares

(e)

May 6, 1963

(f)

\$27.76

(g)

\$13.75

(k)

own account.

(xxiv) (a)

Metro-Goldwyn Mayer

- (b)
purchase
- (c)
33½
- (d)
15 shares
- (e)
June 21, 1963
- (f)
\$10.03
- (g)
\$1.875
- (k)
own account.
- (xxv) (a)
Raytheon Co.
- (b)
sale
- (c)
21⅞
- (d)
1 share
- (e)
July 24, 1963
- (f)
\$1.28
- (g)
\$.125
- (k)
own account.

(xxvi) (a)

International Rectifier

(b)

sale

(c)

8¾

(d)

50 shares

(e)

July 25, 1963

(f)

\$9.38

(g)

\$6.25

(k)

own account.

(xxvii) (a)

International Rectifier

(b)

sale

(c)

8¾

(d)

50 shares

(e)

August 15, 1963

(f)

\$9.19

(g)

\$6.25

(k)

own account.

(59) (xxviii) (a)

Diners Club

(b)

sale

(c)

22¾

(d)

10 shares

(e)

October 24, 1963

(f)

\$6.00

(g)

\$1.25

(k)

Account of Morton Eisen, Custodian for Michael L. Rubinstein.

(xxix) (a)

Avco Corporation

(b)

purchase

(c)

23½

(d)

10 shares

(e)

October 24, 1963

(f)

\$6.00

(g)

\$1.25

(k)

Account of Morton Eisen, Custodian for Michael L. Rubinstein.

(xxx) (a)

Greyhound Corp.

(b)

purchase

(c)

47¼

(d)

20 shares

(e)

November 22, 1963

(f)

\$14.45

(g)

\$5.00

(k)

own account.

(xxxi) (a)

Greyhound Corp.

(b)

sale

(c)

46

(d)

20 shares

(e)

November 22, 1963

(f)

\$14.20

(g)

\$5.00

(k)

own account.

(xxxii) (a)

Control Data

(b)

sale

(c)

97 $\frac{3}{4}$

(d)

5 shares

(e)

November 26, 1963

(f)

\$7.50

(g)

\$1.25

(k)

Account of Morton Eisen, Custodian for Mark J. Eisen.

(xxxiii) (a)

Control Data

(b)

sale

(c)

97 $\frac{3}{4}$

(d)

15 shares

(e)

November 26, 1963

(f)

\$19.66

(g)

\$3.75

(k)

Account of Morton Eisen, Custodian for Eric A.
Eisen.

(60) (xxxiv) (a)

Control Data

(b)

sale

(c)

97 $\frac{3}{4}$

(d)

10 shares

(e)

November 26, 1963

(f)

\$14.78

(g)

\$2.50

(k)

Account of Morton Eisen, Custodian for Michael L. Rubinstein.

(xxxv) (a)

Greyhound Corp.

(b)

purchase

(c)

46 $\frac{7}{8}$ for 20 shares, 46 $\frac{5}{8}$ for 100 shares

(d)

120 shares

(e)

December 5, 1963

(f)

\$14.38 for 20 shares, \$42.31 for 100 shares

(g)

\$5.00

(k)

own account.

(xxxvi) (a)

Control Data

(b)

purchase

(c)

101 $\frac{1}{4}$

(d)

70 shares

(e)

January 3, 1964

- (f) \$44.09
- (g) \$17.50
- (k) own account.
- (xxxvii) (a)
Control Data
- (b) sale
- (c) 86%
- (d) 70 shares
- (e) January 28, 1964
- (f) \$43.07
- (g) \$17.50
- (k) own account.
- (xxxviii) (a)
Greyhound Corp.
- (b) purchase
- (c) 55%
- (d) 30 shares

(e)

February 27, 1964

(f)

\$21.54

(g)

\$7.50

(k)

own account.

(xxxix) (a)

Greyhound Corp. with due bill

(b)

sale

(c)

55 $\frac{1}{8}$ for 50 shares, 55 $\frac{3}{8}$ for 100 shares

(d)

150 shares

(e)

June 18, 1964

(f)

\$30.78 for 50 shares, \$44.54 for 100 shares

(g)

\$12.50

(k)

own account.

(61) (xl) (a)

Chrysler Corp.

(b)

purchase

- (c)
50 $\frac{1}{4}$ for 50 shares, 50 for 100 shares
- (d)
150 shares
- (e)
June 18, 1964
- (f)
\$29.56 for 50 shares, \$44.00 for 100 shares
- (g)
\$12.50
- (k)
own account.
- (xli) (a)
Chrysler Corp.
- (b)
purchase
- (c)
50
- (d)
10 shares
- (e)
June 18, 1964
- (f)
\$10.00
- (g)
\$2.50
- (k)
own account.
- (xlii) (a)
Chrysler Corp.

- (b)
sale
- (c)
66¼ for 60 shares, 66½ for 100 shares
- (d)
160 shares
- (e)
September 15, 1964
- (f)
\$36.88 for 60 shares, \$45.65 for 100 shares
- (g)
\$15.00
- (k)
own account.
- (xliii) (a)
Spiegel Inc.
- (b)
sale
- (c)
38⅝
- (d)
45 shares
- (e)
August 2, 1965
- (f)
\$22.38
- (g)
\$5.625

(k)

own account.

(xliv) (a)

Spiegel Inc.

(b)

sale

(c)

39 $\frac{3}{8}$

(d)

55 shares

(e)

August 25, 1965

(f)

\$26.66

(g)

\$6.875

(k)

own account.

(xlv) (a)

Wolverine Shoe

(b)

purchase

(c)

30 $\frac{1}{8}$

(d)

5 shares

(e)

October 21, 1965

(f)

\$6.00

- (g) .625 cents
- (k) Account of Morton Eisen, Custodian for Mark J. Eisen.
- (xlv) (a) Douglas Aircraft
- (b) sale
- (c) $64\frac{7}{8}$
- (d) 8 shares
- (e) November 10, 1965
- (f) \$10.19
- (g) \$2.00
- (k) own account.
- (62) (xlvii) (a) Morse Shoe, Inc.
- (b) sale
- (c) $24\frac{1}{8}$
- (d) 50 shares

(e)

February 3, 1966

(f)

\$17.06

(g)

\$6.25

(k)

own account.

4: Except for communications with my attorneys, the only communications relating to the subject-matter of this action which I have at any time during the six years next preceding the filing of the complaint in this action had with others was oral and, to the best of my knowledge and recollection, consisted of my general complaint concerning the injustice of the existing odd-lot differential. I have no recollection as to the identity of the persons to whom I directed such comments nor do I know whether any such persons were purchasers or sellers of odd-lots on the New York Stock Exchange.

5: Except for communications with my attorneys, the only communications relating to the subject-matter of this action which I have at any time since the commencement of this action had with others consisted of oral comments of congratulations and good wishes for the successful prosecution of this action from friends and acquaintances and certain persons who called me on the telephone. I have no knowledge as to whether such friends and acquaintances of mine are or ever were purchasers or sellers of odd-lots on the New York Stock Exchange nor do I know the names or have any other information concerning the said persons who called me on the telephone.

(Verified by plaintiff, June 28, 1966.)

**OPINION BY TYLER, J., DATED SEPTEMBER 27, 1966,
GRANTING DEFENDANTS' MOTION TO EXTENT
THAT ACTION, AS CLASS ACTION, IS DISMISSED**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

[SAME TITLE]

TYLER, District Judge:

This is an action brought by a New York resident, Morton Eisen, charging the two major "odd-lot" dealers on the New York Stock Exchange—defendants Carlisle & Jacquelin and DeCoppet & Doremus—with conspiring and combining to monopolize odd-lot trading and with charging excessive fees in violation of the Sherman Act. 15 U.S.C. 1 and 2. The complaint also pleads a third claim or cause of action against the New York Stock Exchange ("Exchange") upon the theory that the Exchange breached its duties prescribed by the Securities Exchange Act of 1934 for suspension of odd-lot trading. 15 U.S.C. 78f(b), 78f(d) and 78s(a). Eisen, who describes himself as an investor, asserts that he sues for himself and on behalf of all odd-lot purchasers and sellers on the Exchange.

The taproot of Eisen's three claims is the so called "odd-lot differential" charged by the broker defendants and other odd-lot dealers for transactions in other than 100 share lots of securities. As is well known, the normal trading units on the stock exchanges are in multiples of 100 shares, sometimes called "round-lots." Odd-lots, thus, are units of stock less than 100, the established unit of trading. For odd-lot transactions, in addition to the normal brokerage commission, an additional fee known as the "odd-lot

differential" is charged. At the time this suit was commenced, the differential was $\frac{1}{8}$ point ($12\frac{1}{2}$ cents) per share when the price per share was $39\frac{7}{8}$ or below and $\frac{1}{4}$ point (25 cents) when the price was 40 or above. Effective July 1, 1966, however, this "break point" of \$40 was increased to \$55 under specific approval of the Securities and Exchange Commission. The execution price of an odd-lot includes the differential. On a customer's order to buy an odd-lot, the differential is added to the price of the effective offer or sale; on a customer's order to sell, the differential is subtracted from the price of the effective sale or bid. It is Eisen's theory in this case that the two broker-dealer defendants, with the benign indulgence of the Exchange, have "established, increased and maintained" the differential.

The defendants have moved pursuant to amended Rule 23(c)(1), F.R.Civ.P., effective July 1, 1966, seeking to obtain an adjudication that the present action is not maintainable as a class action. Plaintiff, of course, relies on new Rule 23 to support his suit as a class action.

Amended Rule 23(a) sets forth four specific prerequisites to a class action:

(1) The class "is so numerous that joinder of all members would be impracticable";

(2) questions of law or fact common to the class exist;

(3) claims or defenses of the representative parties are typical of those of the class; and

(4) the representative parties will adequately protect the interests of the class.

Amended Rule 23(b) specifically states that for a suit to be maintained as a class action, the specific prerequisites just listed must be satisfied and, in addition, at least one of three following requirements or conditions must be shown:

1. Prosecution of separate actions by or against separate members of the class would create a risk of inconsistent or varying adjudications, or adjudications which would practically dispose of or impair the interests of class members not parties thereto;

2. the party opposing the class has acted or failed to act, thereby rendering appropriate injunctive or declaratory relief respecting the entire class; or

3. the court finds that questions of law or fact common to the class predominate over such questions affecting only individual members and, in addition, that the class action is superior to other available methods or procedures for fair and efficient adjudication of the controversy. See *Notes of Advisory Committee on Amendments to Rules of Civil Procedure* (hereinafter "Advisory Com. Notes"), 39 F.R.D. 98-100.

As will be suggested by the discussion hereinafter, plaintiff's suit could only fit in theory the last-mentioned category or requirement set forth in amended Rule 23(b)—i.e. that plaintiff's suit, if to be maintained as a class action, must be shown to present questions of fact or law common to the class which predominate over such questions affecting only individual members. Suffice it to say here that, despite belated unconvincing suggestions to the contrary in their reply brief, plaintiff's counsel originally intended and argued that their client's suit meets this requirement. Thus, plaintiff in effect attempts to show that his action is what was characterized under former Rule 23 as a spurious class action, and it may be at least generally helpful to consider some of the judge-made requirements and prerequisites for maintaining a spurious class action under the old Rule in order to determine if Eisen has successfully met those specifically set forth in subparagraphs (a) and (b)(3) of the amended Rule. See discussion at 39 F.R.D. 98-103.

The spurious class action under the former Rule was considered merely a permissive joinder device, and prior to the July 1, 1966 amendment, the judgment in such cases bound only the original parties of record and those who intervened and became parties to the action. See *Lipsett v. United States*, 359 F.2d 956, 959 (2d Cir. 1966); *All American Airways, Inc. v. Elderd*, 209 F.2d 247 (2d Cir. 1954); *Kainz v. Anheuser-Busch, Inc.*, 194 F.2d 737 (7th Cir. 1952); *Schatte v. International Alliance of Theatrical Stage Employees, etc.*, 183 F.2d 685 (9th Cir. 1950); *California Apparel Creators v. Wieder of California*, 162 F.2d 893 (2d Cir. 1947); *Cutler v. American Federation of Musicians, etc.*, 211 F. Supp. 433 (S.D.N.Y. 1962). The principal requirements for its use were that the character of the right sought to be enforced for or against the class be several, that there be a common question of law or fact affecting the several rights and that common relief be prayed for. Nevertheless, as I read the above cited pre-July 1, 1966, cases and others similar to them, substantially all of the specifically stated prerequisites and requirements now found in amended Rule 23(a) and (b) were deemed essential for maintaining a spurious class action under old Rule 23, even though they were not all spelled out therein. The prerequisite, for example, that the plaintiff bringing the action must be one who will fairly protect the interests of the class was one which, though recognized, did not always cause the courts undue concern, largely because only the original plaintiff and intervenors were bound by the judgment. The Court of Appeals for this Circuit, for example, having long recognized that a spurious class suit under former Rule 23 in reality was no more than a permissive joinder device, stated years ago that, in such suits, "there is no need for a searching inquiry concerning the adequacy of [plaintiff's] representation of others in the class."

York v. Guaranty Trust Co. of New York, 143 F.2d 503 (2d Cir. 1944), *reversed on other grounds*, 326 U.S. 99 (1945). Notwithstanding that comparatively extreme statement, the courts in this circuit, as in others, did not permit use of the class action device under former Rule 23 where it appeared plainly that plaintiff could not properly protect the interests of the class. See *Austin v. Warner Bros. Pictures*, 19 F.R.D. 93 (S.D.N.Y. 1953).

Now that amended Rule 23 purports to obliterate the old distinctions between "true," "hybrid" and "spurious" class actions, however, the requirement that plaintiff be able to fairly insure the adequate representation of all becomes considerably more significant since all members of the class are bound by the judgment unless they expressly ask to be excluded from the class. See amended Rule 23(c) (3), F.R.C.P.; *Lipsett v. United States*, *supra*.

Assuming *arguendo* that plaintiff has adequately set forth and shown compliance with other prerequisites of paragraph (a) of the new rule, he has not established that he "• • • will fairly and adequately protect the interests of the class." This alone is enough for this court to make a determination that this action cannot be maintained as a class action. See *Advisory Com. Notes*, 39 F.R.D. 100 (1966).

Plaintiff in his papers gives no compelling reasons and alleges no facts to support the proposition that he can adequately protect the interests of possibly hundreds of thousands of members of the alleged class except to assert that both of his lawyers are well-qualified antitrust specialists. In disposing of a similar contention made in *Austin Theatre v. Warner Bros. Pictures*, *supra* at 96, Judge McGohey of this court said, "However, here there is required no more than a superficial inquiry to determine that the plaintiff has failed to allege any facts to show that it

will, as claimed, adequately represent the class." Such reasoning applies *a fortiori* under the new concept that all members of a class are bound by any judgment to be entered.

Eisen does not even attempt to estimate the extent of damages which he allegedly suffered as a result of the odd-lot differential, nor does he specify the nature or number of the transactions in which he engaged and wherein he was charged a "differential." A class action is premised in part upon the theory that members of the class who are not before the court can justly be bound because the self-interest of their representatives will assure adequate litigation of the common issues. See *Aalco Laundry & Cleaning Co. v. Laundry Linen & Towel Chauffeurs & Helpers Union*, 115 S.W.2d 89 (Mo. App. 1938). From the facts as presented, it is impossible to determine and rule that Eisen can adequately protect the interests of the absent members of his asserted class. Concededly, he alleges that he has been an active investor in securities since 1960. We are not told, however, in what he invested. Even assuming, as Eisen would have us do, that he bought and sold securities in odd-lots—i.e. in less than 100 share blocks, we do not know which of the more than 1,600 available listed stocks he purchased or sold, the price ranges of the stocks or the considerations that motivated his transactions. That these are relevant facts is beyond serious question. In the six years during which Eisen claims to have been an investor, over 1,147-000,000 shares of stock were traded in odd-lot transactions. Some of the participants in these dealings were investors like Eisen, but just as certainly others were dealers, traders, arbitrageurs and speculators. The prices of the shares involved ranged from several dollars to several hundred dollars. The nature of the myriad odd lot transactions was certainly varied; orders were limited or contingent, on

margin or for cash, long or short, and for a fixed amount or on a long term investment plan.¹ In short, even if Eisen were given leave to serve an amended pleading setting forth with particularity the nature and amount of his own investment transactions, the diverse rights and interests of other members of the claimed class plainly could not be reasonably protected by plaintiff in this litigation.

Eisen's inadequacy as a representative of the asserted class is further underscored by the obvious fact that his interest, as sole plaintiff, is miniscule compared to the interests of the class as a whole. The number of plaintiffs bringing a class action in relation to the numerical size of the class, of course, should not be the sole basis for determining the existence or non-existence of a class action; however, it can be a valid and important factor in assessing plaintiff's ability to adequately represent the class. *Weeks v. Bareco Oil Co.*, 125 F.2d 84 (7th Cir. 1941); *Pelelas v. Caterpillar Tractor Co.*, 113 F.2d 629 (7th Cir. 1940); *McArthur v. Scott*, 113 U.S. 340 (1884). In *Pelelas, supra* at 632, the court held, "... under it [Rule 23] the court is at liberty to consider the number appearing on the record as contrasted with the number in the class. ... There must be a sufficient number of persons to insure a fair representation of the class." Eisen himself estimates—perhaps too conservatively—that the class numbers in the hundreds of thousands.² Thus it is impossible to assume that he alone with a comparatively miniscule and limited interest in odd-lot transactions can represent that large a class, many of whose members necessarily have larger and different interests,

1. See Rule 124 of the New York Stock Exchange.

2. See defendant's affidavit by Sander Landfield wherein it is projected that there may have been as many as 3,750,000 odd-lot customers within the past four to six years.

By far the most serious difficulty with plaintiff's claim to be able to properly protect the interests of the class, in my judgment, is that stemming from subparagraphs (2) and (3) of amended Rule 23(c). In substance, these provide, *inter alia*, that in a class action the best notice practicable must be furnished to the class members and that the notice must specifically warn such persons that they will be bound by any judgment in the action unless they appear and request exclusion therefrom. Further, of course, it is provided in subparagraph (c)(3) that the judgment, whether favorable or unfavorable to the class, shall include all members of the class as found by the court and who do not appear and obtain specific exclusion.

As already suggested, this provision represents a most important substantive change from Rule 23 as it read prior to July 1, 1966. *Lipsett v. United States, supra*. Presumably aware of this change, Eisen claims to be the sole representative of hundreds of thousands of other persons who paid the odd-lot differential and who necessarily will be bound under Rule 23(c)(3) by any judgment in this action unless they specifically ask to be excluded after receiving appropriate notice. Yet he does not claim that one other person or entity has expressed the slightest interest in the prosecution of this action. See *Weeks v. Bareco Oil Co., supra* at 94. More important, Eisen and his counsel have taken the curious position in their papers and upon oral argument that press advertisements plus notices to stock exchange firms will constitute all the notice necessary in this case. To this, I am constrained to make two observations. First, in the light of the new concept under the amended Rule that members of a class are specifically bound by any judgment, favorable or unfavorable, unless they affirmatively "opt out", it is virtually certain that far better notice than plaintiff apparently contemplates would be necessary here to comply with amended Rule 23(c)(2) and,

even more importantly, with due process standards. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315-320 (1950). In other words, as defense counsel have incisively argued, both the Rule and concepts of due process require individual notice for the class members who can be identified and notice amounting to more than a "mere gesture" for those who cannot be identified. Because of obvious practical financial limitations inherent in the circumstances here presented, proper notice as required almost certainly cannot be given—and plaintiff is short of the mark in his arguments to the contrary. Second, plaintiff's erroneous notion that individual notice to members of the class is not required by amended Rule 23 but that publication, either by "free publicity" or by paid advertisement in newspapers of national distribution, or by both, is sufficient, raises the suspicion, which may or may not be justified, that he is more interested in notice for the sake of undesirable solicitation of claims than for proper protection of the interests of the other members of the class. See *Advisory Com. Notes*, 39 F.R.D. 107; *Cherner v. Transition Electronic Corp.*, 201 F. Supp. 934 (DC. Mass. 1962).

For reasons similar to those leading me to conclude that Eisen cannot fairly and properly represent the other members of the class, I am not satisfied that the questions common to the class predominate over questions affecting individual members. Rule 23(b)(3); see *Advisory Com. Notes*, 39 F.R.D. 103. Mention has already been made of the tremendous size of the asserted class, the fact that there is no evidence that any other member has the slightest interest in this litigation and the necessarily varied nature and quantum of the interest of other odd-lot purchasers and sellers. In my view, these circumstances create a powerful presumption that questions affecting individual members predominate over questions common to the class,

and plaintiff has offered little or nothing to rebut this presumption. Moreover, these factors plus the previously discussed difficulties of providing adequate notice to the huge class as required by the amended Rule and by concepts of due process suggest almost insuperable difficulties in fair and proper management of this suit at a class action.

The motion of defendants is granted to the extent that this action, as a class action, is dismissed. This does not mean, however, that the complaint viewed solely as a statement of the individual claims of plaintiff Eisen is dismissed; moreover, nothing herein stated should be construed as a ruling on the merits, or lack thereof, of the claims pleaded on behalf of plaintiff individually.

It is so ordered.

Dated: New York, N. Y.
September 27, 1966.

H. R. Tyler, Jr.
U.S.D.J.

**ORDER DENYING CERTIFICATE UNDER
28 U. S. C. § 1292(b)**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

October 25, 1966

This motion is denied. An intermediate appeal from the opinion and order filed on September 30, 1966 will not materially advance the ultimate resolution of this litigation. No controlling question of law is involved. Nothing has been done to prevent plaintiff from litigating his claims. See *Gottesman v. General Motors Corporation*, 268 F. 2d 194 (2d Cir., 1959); *Kroch v. Texas Company*, 167 F. Supp. 947, at 949 (S. D. N. Y., 1958).

It is so ordered.

H. R. TYLER, JR.
U. S. D. J.

**OPINION OF UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT DATED DECEMBER 19,
1966 (WATERMAN, MOORE AND KAUFMAN, CIRCUIT
JUDGES) DENYING DEFENDANT'S MOTION TO
DISMISS APPEAL**

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

September Term, 1966

(Argued December 12, 1966 Decided December 19, 1966)

Docket No. 30934

[SAME TITLE]

KAUFMAN, Circuit Judge:

The sole question presented by this motion is whether appellant may take an appeal from an order of the district court dismissing his class action, but permitting him to litigate his individual claims.

Morton Eisen brought an action in the district court alleging that two major "odd-lot" dealers on the New York Stock Exchange—Carlisle & Jacquelin and DeCoppet & Doremus—had conspired and combined to monopolize odd-lot trading, and had charged excessive fees, in violation of the Sherman Act. 15 U.S.C. §§1, 2. Specifically, he challenged the so-called "odd-lot differentials" charged by the appellee and other odd-lot dealers for transactions involving other than 100 share lots of securities. The complaint also charged the New York Stock Exchange with having breached its duties, allegedly proscribed by the Securities Exchange Act of 1934, concerning suspension of odd-lot trading. 15 U.S.C. §§78f(b), 78f(d), 78s(a).

Eisen sued both for himself and on behalf of all odd-lot purchasers and sellers on the Exchange. Appellees moved to dismiss the class action, alleging that it was not maintainable under amended Rule 23(c)(1) of the Federal Rules of Civil Procedure. Judge Tyler granted the motion and dismissed the class action, but did not dismiss Eisen's individual claims or pass on their merits.

It is too clear for discussion that all orders are not appealable. 28 U.S.C. §1291 provides that the courts of appeals have jurisdiction of appeals from all "final" decisions of the district courts, while 28 U.S.C. §1292 permits appeals from a narrowly limited class of interlocutory orders. But as the Supreme Court has commented, "[A] decision 'final' within the meaning of §1291 does not necessarily mean the last order possible to be made in a case." *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964). The question presented to us, therefore, is whether Judge Tyler's order dismissing the class action falls within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

In making this determination, Justice Douglas' language in the *Gillespie* case is instructive:

[I]t is impossible to devise a formula to resolve all marginal cases coming within what might well be called the "twilight zone" of finality. Because of this difficulty this Court has held that the requirement of finality be given a "*practical rather than a technical construction.*" * * *

[I]n deciding the question of finality the most important competing considerations are "the incon-

venience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." 379 U.S. at 152-53 (emphasis supplied).

In the present case, these considerations, rather than being "competitive," lead to a single conclusion—that the order dismissing this class action is appealable. The alternatives are to appeal now or to end the lawsuit for all practical purposes. Judge Tyler's order "if unreviewed, will put an end to the action." *Chabot v. National Securities and Research Corp.*, 290 F. 2d 657, 659 (2d Cir. 1961). We can safely assume that no lawyer of competence is going to undertake this complex and costly case to recover \$70 for Mr. Eisen. See *Escott v. Barchris Constr. Corp.*, 340 F. 2d 731, 733 (2d Cir.), *cert. denied sub nom. Drexel & Co. v. Hall*, 382 U.S. 816 (1965). If the appeal is dismissed, not only will Eisen's claims never be adjudicated, but no appellate court will be given the chance to decide if this class action was proper under the newly amended Rule 23.

There are, therefore, most compelling reasons to deny this motion to dismiss the appeal; and permitting Eisen to proceed in no way conflicts with any precedents of this Court. Appellees rely on *Oppenheimer v. F. J. Young & Co.*, 144 F. 2d 387 (2d Cir. 1944), but that decision was reached before the Supreme Court spoke in *Cohen, supra*. While it is true that in *Lipsett v. United States*, 359 F. 2d 956 (2d Cir. 1966), we did not permit an appeal from the dismissal of a class action, we reached that conclusion because the facts did not come within the framework of the *Cohen* doctrine; the plaintiffs lacked standing, and dismissal of the class action allegations, we said, merely "prettified" the pleadings since the action could still continue.

Dismissal of the class action in the present case, however, will irreparably harm Eisen and all others similarly

situated, for, as we have already noted, it will, for all practical purposes terminate the litigation. Where the effect of a district court's order, if not reviewed, is the death knell of the action, review should be allowed. See *Roberts v. U.S. District Court*, 339 U.S. 844 (1950); *Chabot v. National Securities and Research Corp.*, *supra*.

Motion denied.

**ORDER OF UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT DATED JANUARY 13,
1967, DENYING PETITION FOR REHEARING
IN BANC**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

September term 1966

Docket No. 30934

[SAME TITLE]

Carter Ledyard & Milburn, New
York, N. Y., for Carlisle & Jac-
quelin, appellee.

Kelley Drye Newhall Maginnes &
Warren, New York, N. Y., for
DeCoppet & Doremus, appellee.

Milbank, Tweed, Hadley & McCloy,
New York, N. Y., for New York
Stock Exchange appellee.

No active circuit judge having requested that a vote be
taken on the suggestion that the case be reheard in banc,
the same stands denied.

s/ J. EDWARD LUMBARD
Chief Judge

13 January 1967

**ORDER OF UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT DATED JANUARY 13,
1967, DENYING PETITION FOR REHEARING**

UNITED STATES COURT OF APPEALS
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DeCoppet & Doremus, appellee.

Milbank, Tweed, Hadley & McCloy,
New York, N. Y., for New York
Stock Exchange, appellee.

Motion denied.

S. R. W.

L. P. M.

L. R. K.

U. S. C. JJ.

January 13, 1967

**OPINION OF UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT DATED MARCH 8, 1968
(MEDINA AND HAYS, CIRCUIT JUDGES) REVERSING
AND REMANDING AND DISSENTING
OPINION OF CHIEF JUDGE LUMBARD**

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

No. 78—September Term, 1967.

(Argued November 6, 1967

Decided March 8, 1968.)

Docket No. 30934

[SAME TITLE]

MEDINA, Circuit Judge:

On this appeal we are presented with significant questions involving the interpretation of recently amended Rule 23 of the Federal Rules of Civil Procedure. Morton Eisen instituted this action seeking damages and injunctive relief on behalf of himself and all other purchasers and sellers of "odd-lots" on the New York Stock Exchange against Carlisle & Jacquelin and DeCoppet & Doremus, alleging that the two brokerage firms had combined and conspired to monopolize odd-lot trading, and had fixed the odd-lot differential at an excessive amount in violation of the Sherman Act. 15 U.S.C. Sections 1, 2. A third count alleged that the defendant New York Stock Exchange had failed to discharge its duties under the Securities Exchange Act of 1934 by neglecting to adopt rules protecting investors in odd-lots. 15 U.S.C. Sections 78f(b), 78f(d), 78s(a).

Following a motion by defendants for a determination pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, Judge Tyler held that the suit could not be

brought as a class action. *Eisen v. Carlisle & Jacquelin*, 41 F.R.D. 147 (S.D.N.Y. 1966). A motion to dismiss the present appeal because the decision below constituted a non-final order has previously been denied by this Court. *Eisen v. Carlisle & Jacquelin*, 370 F. 2d 119 (2d Cir. 1966), cert. denied 386 U.S. 1035 (1967). In dismissing the class action the District Court found that plaintiff failed to demonstrate that he would be able fairly and adequately to protect the interests of the class, Fed. R. Civ. P. 23(a) (4); that the notice required by due process and the rule, Fed. R. Civ. P. 23(c)(2), could not be given and that questions common to the class did not predominate over questions affecting individual members. Fed. R. Civ. P. 23 (b)(3).

At the outset, it is necessary briefly to describe the mechanics of odd-lot trading on the New York Stock Exchange. The regular unit of trading on the Exchange is the "round lot" of 100 shares. An "odd-lot" is the term used to designate transactions involving less than 100 shares. Odd-lot orders do not form part of the "regular auction market" but are exclusively handled by special odd-lot dealers who buy and sell for their own account as principals. In order to purchase or sell an odd-lot an individual first contacts a brokerage firm which then places an order with the odd-lot dealer. The cost to the customer includes both a standard commission payable to the brokerage firm and the odd-lot differential which is received by the odd-lot dealer. The differential is a figure amounting to a fraction of a point for each share traded, which is added to the customer's purchase price and deducted from the sale price. During the period of time in which plaintiff had alleged he was involved in the odd-lot market, covering the years 1960-1966, the differential was $\frac{1}{8}$ th of a point ($12\frac{1}{2}$ cents) per share on stock selling below \$40 per share and $\frac{1}{4}$ of a point (25 cents) per share on stock selling at \$40 or above per

share.¹ Over the years odd-lot trading has accounted for a fairly steady percentage of the total volume on the Stock Exchange, ranging from a high of 12.9% in 1937 to a low of 7.9% in 1950 and 1958. For example, recent figures indicate that in 1961 the volume of odd-lot transactions totaled 214,018,834 shares. SEC, Report of Special Study of Securities Markets, H. R. Doc. No. 95, Pt. 2, 88th Cong. 1st Sess. 171-202, 393 (1963), hereinafter cited as SEC Special Study. Defendants Carlisle & Jacquelin and De-Coppet & Doremus are engaged exclusively in odd-lots and collectively they handled 99% of the volume in odd-lot transactions. SEC Special Study at 172. Various alleged abuses in odd-lot trading disclosed by the SEC in 1963, form, in large part, the basis of the present action. See SEC Special Study at 171-202.

I

Class actions serve an important function in our judicial system. By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation. Nevertheless, Rule 23 of the Federal Rules of Civil Procedure, as it was originally enacted, did not effectively achieve either of the above two objectives. Class actions were divided into various categories reflecting the "jural relationships of the members of the class." See 3 Moore, Federal Practice par. 23.08 at 3434 (2d ed. 1953). Only after a determination of the nature

1. The above figures do not reflect the change made in the differential which was effective as of July 1, 1966. Subsequent to that time the so-called "breakpoint" was raised to \$55, with the differential amounting to $\frac{1}{8}$ th of a point on stock sold below that figure and $\frac{1}{4}$ of a point on stock sold above it.

of the rights: "joint, common or secondary" in the true class action, "several related to specific property" in the hybrid class action, and "several affected by a common question and related to common relief" in the spurious class action, was a court able to proceed. Advisory Committee's Note, Proposed Rules of Civil Procedure, 39 F.R.D. 98 (1965), hereinafter cited as Advisory Committee's Note. There were significant differences in the *res judicata* effects accorded to the various class actions. Thus while a judgment in a true class action was binding on the entire class, the spurious class action only concluded the rights of parties. 3 Moore, Federal Practice par. 23.11 at 3472 (2d ed. 1953). Since the great majority of cases fell into this latter category, the objective of determining all questions in one suit was effectively frustrated. In essence, the spurious class action was interpreted as merely a permissive joinder device.² See *Carroll v. American Federation of Musicians*, 372 F. 2d 155 (2d Cir. 1967); *Fox v. Glickman Corp.*, 355 F. 2d 161 (2d Cir. 1965), *cert. denied* 384 U.S. 960 (1966); *Nagler v. Admiral Corp.*, 248 F. 2d 319 (2d Cir. 1957); *Oppenheimer v. F. J. Young & Co.*, 144 F. 2d 387 (2d Cir. 1944). But see *Weeks v. Bareco Oil Co.*, 125 F. 2d 84 (7th Cir. 1941) (dictum).

To avoid the problems associated with the original rule the Advisory Committee on the Rules of Civil Procedure has completely redrafted Rule 23 in order to provide a thoroughly flexible remedy. Throughout the course of a proceeding courts are given complete control to give assurance that the procedures adopted are fair, reasonable and

2. There was a serious split in court decisions on the subject of the permissibility of "one-way intervention." Under this procedure, absent class members in a spurious action were permitted to intervene after a favorable judgment, while at the same time they were not bound by an unfavorable decision. Advisory Committee's Note at 105.

effective. All actions will result in judgments binding on the entire group of individuals found by the court to be members of the class. Fed. Rule C. P. 23(c)(3). While the new concepts incorporated in the rule have not as yet been passed upon by any federal³ Court of Appeals,³ they have received somewhat less than an enthusiastic reception in the District Courts. Compare *School District of Philadelphia v. Harper & Row Publishers, Inc.*, 267 F. Supp. 1001 (E.D. Pa. 1967), expressing grave doubts about the propriety of a rule which binds absent but described class members, with *Siegel v. Chicken Delight Inc.*, 271 F. Supp. 722 (N.D. Cal. 1967) which upholds a class action brought by 5 franchise dealers on behalf of a class of over 700 dealers, alleging anti-trust violations. Nevertheless, the majority of courts have upheld the validity of representative actions brought under the new rule. See, e.g., *Van Gemert v. Boeing Co.*, 259 F. Supp. 125 (S.D.N.Y. 1966); *Fischer v. Kletz*, 41 F.R.D. 377 (S.D.N.Y. 1966); *Kronenberg v. Hotel Governor Clinton, Inc.*, 41 F.R.D. 42 (S.D.N.Y. 1966); *Brennan v. Midwestern United Life Insurance Co.*, 259 F. Supp. 673 (N.D. Indiana 1966); *Booth v. General Dynamics Corp.*, 264 F. Supp. 465 (N.D. Ill. 1967). But see *Richland v. Cheatham*, 272 F. Supp. 148 (S.D.N.Y. 1967); *Hohmann v. Packard Instrument Co.*, 43 F.R.D. 192 (N.D. Ill. 1967); *Jacobs v. Paul Hardeman, Inc.*, 42 F.R.D. 595 (S.D.N.Y. 1967); *Berger v. Purolator Products, Inc.*, 41

3. The Fifth Circuit has on two occasions been presented with issues under the new rule. However, each of these cases involved aspects of class actions which are similarly handled under both the original and the amended rule 23. In one case the 5th Circuit held that claims could not be aggregated under the new rule to meet the jurisdictional amount in a suit which formerly would have been classified as a spurious action. *Alvarez v. Pan American Life Ins. Co.*, 375 F. 2d 992 (5th Cir. 1967). The other case involved a routine denial of a class action because the representative and the class members had conflicting interests in the subject matter of the suit. *Anderson v. Moorer*, 372 F. 2d 747 (5th Cir. 1967).

F.R.D. 542 (S.D.N.Y. 1966). Although representing a totally different approach to class actions, the new rule does retain two standards which were embodied in the old rule, namely, the class must be so numerous as to make it impracticable to bring every member before the court, and the representative party must be able fairly and adequately to protect the interests of the entire class. Necessarily the old case law will furnish some guidance in defining these concepts.

II.

To be maintainable as a class action a suit must meet all the requirements set forth in Section 23(a)⁴ and also fall within one of the subsections of 23(b).⁵

4. "Rule 23. Class Actions

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

5. "(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

Plaintiff has alleged that he was engaged in odd-lot trading during the years 1960-1966. Though estimates of the number of class members similarly engaged in this activity during those years have varied, all the litigants concede "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Defendants' "rough" approximation, not disputed by plaintiff, would place 3,750,000 individual and corporate buyers and sellers of odd-lots in the class. Similarly, the allegation that a conspiracy, whose object was to charge excessive rates on odd-lot transactions existed between the two brokerage firms, satisfies the requirement that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Furthermore, plaintiff's claim is "typical of the claims * * * of the class." Fed. R. Civ. P. 23(a)(3). Although there are varying fact patterns underlying each individual odd-lot transaction, the same allegedly unlawful differential is charged to all buyers and sellers. However, defendants have argued that different members of the class will have varying theories as to what constitutes the "excessive price," and other class members may be satisfied with the present price policy.⁶ Nonetheless, all members

5. (Cont'd.)

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

6. For example, defendants maintain that a purchaser of an odd-lot at a cost below the "breakpoint" figure might urge that the differential be revised for the benefit of his class (stock selling at \$40 or above) at the expense of the other class (stock selling below \$40).

of the class, including those who would otherwise prefer to abide by the status quo, will be helped if the rates are found to be excessive.

Inability on the part of the plaintiff to "fairly and adequately protect the interests of the class," Fed. R. Civ. P. 23(a)(4), was considered by the District Court to be one of the primary reasons for dismissing the class action. We believe the court employed incorrect standards in reaching this result.

Since Eisen had not alleged with specificity the nature of his various odd-lot transactions, the court below felt it lacked sufficient information properly to assess his qualifications as a representative, and, even if such information were alleged, "the diverse rights and interests of other members of the claimed class plainly could not be reasonably protected by plaintiff in this litigation." *Eisen v. Carlisle & Jacquelin*, 41 F. R. D. 147, 150 (S. D. N. Y. 1966). The District Judge also felt it was impossible to assume that plaintiff "alone with a comparatively minuscule and limited interest in odd-lot transactions" could represent a class numbering at least in the hundreds of thousands, which encompassed individuals with much larger and different interests. *Eisen v. Carlisle & Jacquelin*, 41 F. R. D. 147, 151 (S. D. N. Y. 1966).

Traditionally, courts have expressed particular concern for the adequacy of representation in a class suit because the judgment conclusively determines the rights of absent class members. See *Hansberry v. Lee*, 311 U.S. 32 (1940).

6. (Cont'd.)

However, plaintiff, as demonstrated by his answers to interrogatories, has purchased stock at prices both above and below the prevailing breakpoint. It seems farfetched to argue that plaintiff will adopt a position detrimental to his own interest. If plaintiff does pursue a self-defeating course of conduct, the class action may then be dismissed on the ground that he has failed adequately to represent the entire class. The court is also empowered to divide the present class into appropriate sub-classes. Fed. R. Civ. P. 23(c)(4).

Of course, understandably, the standards for representation under the old spurious class action were not as rigorously enforced, due to the minimal *res judicata* effects given to the judgments in these suits. See *Oppenheimer v. F. J. Young & Co.*, 144 F. 2d 387 (2d Cir. 1944). However, as a result of the sweeping changes in Rule 23, a court must now carefully scrutinize the adequacy of representation in all class actions.

What are the ingredients that enable one to be termed "an adequate representative of the class?" To be sure, an essential concomitant of adequate representation is that the party's attorney be qualified, experienced and generally able to conduct the proposed litigation. Additionally, it is necessary to eliminate so far as possible the likelihood that the litigants are involved in a collusive suit or that plaintiff has interests antagonistic to those of the remainder of the class. See *Hansberry v. Lee*, 311 U. S. 32 (1940). Courts, on occasion, have also required that the interest of the representative party be co-extensive with the interest of the entire class, but this amounts to little more than an alternative way of stating that the plaintiff's claim must be typical of those of the entire class, an element we have already discussed. See *Richard v. Cheatham*, 272 F. Supp. 148 (S. D. N. Y. 1967). However, we believe that reliance on quantitative elements to determine adequacy of representation, as was done by the District Court, is unwarranted. Language to the effect that a small number of claimants cannot adequately represent an entire class has frequently been cited, see, e.g., *Pelelas v. Caterpillar Tractor Co.*, 113 F. 2d 629 (7th Cir.), *cert. denied* 311 U. S. 700 (1940), but we fail to understand the utility of this approach. If class suits could only be maintained in instances where all or a majority of the class appeared, the usefulness of the procedure would be severely curtailed.

As has previously been stated, one of the primary functions of the class suit is to provide "a device for vindicating claims which, taken individually, are too small to justify legal action but which are of significant size if taken as a group." *Escott v. Barchris Construction Corp.*, 340 F. 2d 731, 733 (2d Cir. 1965), *cert. denied* 382 U. S. 816 (1966). Individual claimants who may initially be reluctant to commence legal proceedings may later join in a class suit, once they are assured that a forum has been provided for the litigation of their claims. See *Siegel v. Chicken Delight Inc.*, 271 F. Supp. 722 (N. D. Cal. 1967). But to dismiss a class suit in its incipiency before claimants have been given an effective opportunity to join would be a disservice to the class action as envisioned in the new rule. Indeed, we hold that the new rule should be given a liberal rather than a restrictive interpretation, *Escott v. Barchris Construction Corp.*, 340 F. 2d 731, 733 (2d Cir. 1965), *cert. denied* 382 U. S. 816 (1966), and that the dismissal *in limine* of a particular proceeding as not a proper class action is justified only by a clear showing to that effect and after a proper appraisal of all the factors enumerated on the face of the rule itself.

We are not persuaded that it is essential that any other members of the class seek to intervene. Absent class members will be able to share in the recovery resulting in the event of a favorable judgment, and, if they wish to avoid the binding effect of an adverse judgment they may in various ways and at various times that we need not now attempt to particularize, attack the adequacy of representation in the initial action or disassociate themselves from the case. *Hansberry v. Lee*, 311 U. S. 32 (1940); see Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L. Rev. 433, 436 (1960). If we have to rely on one litigant to assert the rights of a large class then rely we must. The dismissal of the suit out of hand for lack

of proper representation in a case such as this is too summary a procedure and cannot be reconciled with the letter and spirit of the new rule.

Necessarily, a different situation is presented where absent class members inform the court of their displeasure with plaintiff's representation, see *Hess v. Anderson, Clayton & Co.*, 20 F. R. D. 466 (S. D. Cal. 1957), but the representative party cannot be said to have an affirmative duty to demonstrate that the whole or a majority of the class considers his representation adequate. Nor can silence be taken as a sign of disapproval.⁷

It is also worthy of note that the rule contains provisions which, by themselves, are designed to insure proper representation. For example, 23(e) requires court approval of a settlement, thus minimizing the danger that the rights of the class will be unfairly compromised. Accordingly, we decide that the District Court should reconsider the adequateness of plaintiff's representation in the light of the standards which we have set forth in this opinion.⁸

III.

In addition to complying with the requirements of Section (a) of Rule 23, a potential class action must also

7. At various points in its commentary the Advisory Committee has referred to an article written by former Professor (now Judge) Jack B. Weinstein. In speaking of the adequacy of representation question Weinstein has said: "A class action should not be denied merely because every member of the class might not be enthusiastic about enforcing his right. * * * The court need concern itself only with whether those members who are parties are interested enough to be forceful advocates and with whether there is reason to believe that a substantial portion of the class would agree with their representatives were they given a choice." Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 Buffalo L. Rev. 433, 460 (1960).

8. Inadvertently the court below did not notice that plaintiff, in answer to interrogatories, specifically listed his transactions in odd-lots. His damages were estimated at \$70.

satisfy the requirements of one of the three subsections of 23(b).⁹ Plaintiff has argued that the present action is maintainable under all three subsections of 23(b). However, we believe both 23(b)(1)(A)¹⁰ and 23(b)(2) are not applicable to the present factual situation. Subsection (b)(1)(A) authorizes a class action if "the prosecution of separate actions by or against individual members would create a risk of * * * inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." Plaintiff has effectively rebutted his own argument because he admits that individual actions could not be brought as the small claimants who constitute the entire class could not, on an individual basis, afford the expense of lengthy anti-trust litigation. Under these circumstances there is little danger that individual suits will establish "incompatible standards of conduct" for the defendants. Subsection (b)(2) was never intended to cover cases like the instant one where the primary claim is for damages, but is only applicable where the relief sought is exclusively or predominantly injunctive or declaratory. Advisory Committee's Note at 102.

We must also note that plaintiff's effort to qualify the action under 23(b)(1) and 23(b)(2) was induced by his erroneous theory that notice is not "mandatory" under these sections. This theory is based on the assumption that 23(c)(2)¹¹ provides the only "mandatory" notice required

9. See footnote 5, *supra*.

10. Plaintiff does not now claim that 23(b)(1)(B) is applicable.

11. Rule 23(c)(2):

"In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date;

by the new rule. Since this particular section refers exclusively to actions brought under 23(b)(3), other suits cognizable under either 23(b)(1) or 23(b)(2) would only be subject to "discretionary" notice under 23(d)(2).¹² Nevertheless, we hold that notice is required as a matter of due process in all representative actions, and 23(c)(2) merely requires a particularized form of notice in 23(b)(3) actions. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950). Advisory Committee's Note at 107.

Ultimately plaintiff must fall back on subsection (b)(3), which in effect corresponds to the old spurious class action. Presumably influenced by the same thinking which relegated the old spurious class action to the position where it was used primarily as a device for permissive joinder, the Advisory Committee has commented that "class action treatment is not as clearly called for [in (b)(3) situations] but it may nevertheless be convenient and desirable depending upon the particular facts." Advisory Committee's Note at 102. A court, under this subsection, is thus required to find that the questions of law or fact common to the class predominate over questions affecting individual members

11. (Cont'd.)

(B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

12. Rule 23(d):

"(d) *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies, the court may make appropriate orders: * * * (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; * * *."

and that the class action is "superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Moreover, resolution of the issue concerning the propriety of a suit under 23(b)(3) involves an assessment of various factors, including among others, "(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum"; and "(D) the difficulties likely to be encountered in the management of a class action." Fed. R. Civ. P. 23(b)(3).

The District Court felt "the tremendous size of the asserted class, the fact that there is no evidence that any other member has the slightest interest in this litigation" and the "varied nature and quantum of the interests of other odd-lot purchasers and sellers" necessarily compelled a finding that questions affecting individual members predominated over questions common to the entire class. *Eisen v. Carlisle & Jacquelin*, 41 F.R.D. 147, 152 (S.D.N.Y. 1966).

However, under both the old and the amended rule 23, anti-trust violations practised upon large groups of individuals have been held to involve sufficient common questions of law or fact to merit treatment as class actions. *Kainz v. Anheuser-Busch, Inc.*, 194 F. 2d 737 (7th Cir.), cert. denied 344 U.S. 820 (1952) (old rule); *City of Philadelphia v. Morton Salt Co.*, 248 F. Supp. 506 (E.D. Pa. 1965) (old rule); *Siegel v. Chicken Delight, Inc.*, 271 F. Supp. 722 (N.D. Cal. 1967) (new rule); but see *School District of Philadelphia v. Harper & Row Publishers, Inc.*, 267 F. Supp. 1001 (E.D. Pa. 1967) (new rule). The Advisory Committee has specifically noted that "concerted anti-trust violations may involve" predominantly common questions.

Advisory Committee's Note at 103. Suits alleging violations of Section 10(b) of the Securities Exchange Act, though often involving separate consideration of the elements of misrepresentation and reliance as they affect individual members, have also been accorded treatment as class actions under the new rule. *Fischer v. Kletz*, 41 F.R.D. 377 (S.D.N.Y. 1966); *Kronenberg v. Hotel Governor Clinton, Inc.*, 41 F.R.D. 42 (S.D.N.Y. 1966); *Brennan v. Midwestern United Life Ins. Co.*, 259 F. Supp. 673 (N.D. Indiana 1966); but see *Berger v. Purolator Products, Inc.*, 41 F.R.D. 542 (S.D.N.Y. 1966).

We realize that members of the proposed class might have had different motives when they entered into the odd-lot market.¹³ We are also mindful of the fact that there may be a wide variety of orders some of which may require special handling by the odd-lot dealer.¹⁴ Nevertheless, the alleged underlying conspiracy does contain a so-called "common nucleus of operative facts." *Siegel v. Chicken Delight, Inc.*, 271 F. Supp. 722 (N. D. Cal. 1967). All of these differences among the class members bear only on the computation of damages, a factor which, by itself, does not justify dismissal of the class action. *Kronenberg v. Hotel Governor Clinton, Inc.*, 41 F. R. D. 42 (S. D. N. Y. 1966); *City of Philadelphia v. Morton Salt Co.*, 248 F. Supp. 506 (E. D. Pa. 1965). Potential rivalry between class members after an initial finding of liability can be adequately handled since the rule gives a court the power to divide the class into appropriate subclasses or to require the members to bring individual suits for damages. Fed. R. Civ. P. 23(c)(4); Advisory Committee's Note at 106. Even

13. For example defendants have referred to the different motives present in the following class members: investors, traders, speculators and arbitrageurs.

14. Defendants have listed 20 different types of orders including, among others, varying forms of limit orders, contingent orders and market orders.

if individual questions arise during the course of litigation, which render the action "unmanageable," the court still has the power at that time to dismiss the class action and permit the plaintiff to proceed only on behalf of himself. Fed. R. Civ. P. 23(c)(1). Therefore, at this early stage of the proceedings, we find there has been an adequate demonstration that common questions of law or fact predominate over individual questions. See *Kronenberg v. Hotel Governor Clinton, Inc.*, 41, F. R. D. 42 (S. D. N. Y. 1966).

Before allowing a suit to proceed under 23(b)(3) the trial court must also find that a "class action is superior to other available methods for the fair and efficient adjudication of the controversy." Although defendants argue that intervention and permissive joinder¹⁵ are both superior to a class action, implicit in Judge Kaufman's prior opinion above referred to, denying defendants' motion to dismiss the appeal for lack of jurisdiction, is the assumption that the only feasible way to litigate these claims is by a class action.¹⁶ The odd-lot differential payable on any one transaction under the rate schedule in effect at the time the complaint was filed ranged from 12½ cents to \$24.75.¹⁷ Plain-

15. In one of the first articles criticizing old Rule 23 joinder was described as a situation which "presupposes the prospective plaintiffs advancing en masse on the courts." Surely that is not the case in the instant action. Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 Univ. of Chicago L. Rev. 684 (1941).

16. "Dismissal of the class action in the present case, however, will irreparably harm Eisen and all others similarly situated, for, * * * it will for all practical purposes terminate the litigation." *Eisen v. Carlisle & Jacquelin*, 370 F. 2d 119, 121 (2d Cir. 1966), cert. denied 386 U. S. 1035 (1967). Judge Kaufman had assumed that \$70 would be a reasonable estimate of plaintiff's damages. "We can safely assume that no lawyer of competence is going to undertake this complex and costly case to recover \$70 for Mr. Eisen." *Eisen v. Carlisle & Jacquelin*, *supra* at 120.

17. Thus the minimum figure would apply where the transaction involves one share of stock selling for a price under \$40. The maximum figure would apply where the transaction involved 99 shares selling for a price of \$40 or above.

tiff engaged in 47 odd-lot transactions between 1960 and 1966 paying a total of \$259 in odd-lot differentials. Recognizing the nature of the odd-lot differential and the type of investors who often engage in these transactions, we think it highly unlikely that any one potential plaintiff would have sustained sufficient damages to warrant, as a practical matter, individual prosecution of his claim.¹⁸ Thus the present case appears to fall within that class of cases in which "the interests of individuals in conducting separate lawsuits" are more "theoretic than practical" since "the amounts at stake for individuals (are) * * * so small that separate suits would be impracticable." Advisory Committee's Note at 104. This belief is reinforced by the fact that there is no other pending litigation dealing with the subject matter of this suit. In any event, we are bound by Judge Kaufman's ruling as the law of this case.

Bearing in mind the desirability of providing small claimants with a forum in which to seek redress for alleged large scale anti-trust violations,¹⁹ we are still reluctant to permit actions to proceed where they are not likely to benefit anyone but the lawyers who bring them. Concededly, the damages for individual class members will be small and the possibility remains that the amount expended on the paper work which would be necessary in order to file and prove a claim may exceed the amount of damages sus-

18. The possibility, as suggested by defendants, that a court may grant attorney's fees in excess of the damages awarded does not provide a meaningful alternate. It is unlikely that a plaintiff with a small claim will undertake complex anti-trust litigation on the remote possibility that a court may award anything like compensatory attorney's fees.

19. See Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 Univ. of Chicago L. Rev. 684 (1941); Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 Buffalo L. Rev. 433 (1960); Frankel, *Amended Rule 23 From a Judge's Point of View*, Symposium on Amended Rule 23, 32 A. B. A. Antitrust L. J. 251, 295-98 (1966).

tained. On the other hand, courts in the past have been able to fashion procedures in order to deal with the distribution of millions of dollars in damages to thousands of small claimants. See Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 *Univ. of Chicago L. Rev.* 684, 686 (1941).²⁰ Moreover, in the present case there is apparently no public administrative body that could ensure repayment, so the responsibility must ultimately rest on the judicial system. See Comment, *Recovery of Damages in Class Actions*, 32 *Univ. of Chicago L. Rev.* 768, 785 (1965).

Before allowing the suit to proceed, a further inquiry by the District Court is necessary in order to consider the mechanics involved in the administration of the present action. Defendants may be able to present data indicating that in analogous situations large sums have been absorbed by paper work, fees of Special Masters, printing, postage and so on. Procedures should be outlined with regard to possible intervention by other class members and provisions made for the filing of claims. The court should explore the problems which individual class members would be likely to encounter in filing and proving their claims. If as a practical matter class members are not likely ever to share in an eventual judgment, we would probably not permit the class action to continue. There may conceivably be questions of jurisdiction or venue, as well as of demands for a jury trial.

In view of the arguments previously discussed relating to the necessity for separate computation of damages because of the variety of services performed by the defendant-

20. Reference is made by Kalven & Rosenfield to the Illinois Bell Telephone Co. rate case where extensive litigation resulted in the actual distribution of about \$17,000,000. Over 85% of the claims were for less than \$25 and refunds were made to more than a million people. See *Illinois Bell Telephone v. Slattery*, 102 F. 2d 58 (7th Cir.), *cert. denied* 307 U. S. 648 (1939).

dealers, it is not inconceivable that the District Court on remand may conclude that these separate questions present insuperable problems of judicial administration sufficient to justify the dismissal of the action.²¹ However, we do not express any opinion on this subject and we simply note that other courts in similar cases have been able to set up formulas of procedure for recovery that are applicable to an entire class. See, e.g., *Union Carbide & Carbon Corp. v. Nisley*, 300 F. 2d 561 (10th Cir. 1961), *petition for cert. dismissed* 371 U. S. 801 (1962). The court may also find that it is too early in the proceedings adequately to determine potential damage questions and hence that a decision on the propriety of a class action may have to be postponed.

IV

The notice requirement of 23(c)(2), as recognized by Judge Tyler, presents what may turn out to be the most serious obstacle to the maintenance of the present action. Subsection 23(c)(2) provides:

"In any class action maintained under (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion, may, if he desires, enter an appearance through his counsel."

21. As previously discussed, it would also be possible to order separate consideration of the question of damages.

The District Judge held that "both the Rule and concepts of due process require individual notice for the class members who can be identified." *Eisen v. Carlisle & Jacquelin*, 41 F. R. D. 147, 151 (S. D. N. Y. 1966). As a result of "practical financial limitations" present in the instant case, he was of the opinion that the notice requirement could not be met. Publication plus the mailing of individual notice to stock exchange member firms was rejected as a possible alternative method.

While the Supreme Court has recognized that class actions represent an exception to the general rule under which only parties are bound by a judgment, the procedure adopted must conform to the requirements of due process and fairly insure the protection of absent parties who are to be bound. *Hansberry v. Lee*, 311 U. S. 32, 42 (1940). Notice, as an integral part of due process must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314 (1950). The Advisory Committee in its note has suggested that the mandatory notice pursuant to 23(d)(2)²² were intended to fulfill the requirements of due process established in *Hansberry* and *Mullane*. Advisory Committee's Note at 107. The Advisory Committee also sought to ensure that individual interests would be respected in (b)(3) cases by giving class members the opportunity to avoid being bound by the judgment if they requested exclusion and so informed the court.

The task of furnishing notice to the class members in such a case as this must rest upon the representative party when he is the plaintiff.²³ Appellant has argued that mail

22. See footnote 12, *supra*.

23. See Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv.

notice to the entire class would cost approximately \$400,000, and, therefore, must be deemed impracticable within the context of 23(c)(2). Consequently, a decision requiring such notice would effectively foreclose all opportunity to secure relief. Plaintiff contends that publication is "the best notice practicable under the circumstances." On the other hand, defendants suggest that cost considerations should not prevent many class members from receiving the individual notice they are entitled to both by the requirements of due process and by the terms of 23(c)(2), since their identities are "very easily ascertainable." *Schroeder v. City of New York*, 371 U. S. 208 (1962).

The District Courts have been inconsistent in their interpretations of the notice requirement under the new rule. One opinion reads 23(c)(2) as requiring that actual notice be given to all absent class members, *Richard v. Cheatham*, 272 F. Supp. 148 (S. D. N. Y. 1967), while another has permitted a representative to use notice by publication to inform an entire class in a taxpayer's suit. *Booth v. General Dynamics Corps.*, 264 F. Supp. 465 (N. D. Ill. 1967). See also *Harris v. Jones*, 41 F. R. D. 70 (D. C. Utah 1966), requiring individual notice to be given to 1500 class members in an action for violation of Rule 10b-5 of the Securities Exchange Act because all the names and addresses were on file and available.

On the record before us we cannot arrive at any rational and satisfactory conclusion on the propriety of resorting to some form of publication as a means of giving the necessary notice to all members of the class on behalf of whom

23. (Cont'd.)

L. Rev. 356, 398 (1967); Frankel, Amended Rule 23 From a Judge's Point of View, Symposium on Amended Rule 23, 32 A. B. A. Antitrust L. J. 251 at 300. We fail to see any support for the position adopted in *School District of Philadelphia v. Harper & Row Publishers, Inc.*, 267 F. Supp. 1001 (E. D. Pa. 1967) that the court itself has the burden of sending out the proper notice.

the action is stated to be commenced and maintained. But we assume that some sort of ritualistic notice in small print on the back pages of a newspaper would in no event suffice. Not only did the court below fail to analyze and give proper consideration to the standards set forth in 23(c)(2); there was also a lack of evidentiary basis for the findings necessary to support rulings of what would or would not amount to compliance with the requirements of due process and with the provisions of 23(c)(2) to which reference has already been made.

Can any members of the class be identified through reasonable effort so that such persons may be given individual notice? Without an evidentiary hearing we do not see how this question can be answered. And, until it is answered, how is one to give any rational consideration to the question of what notice by publication would be deemed appropriate, what should be stated in the notice, and who is to take on the burden of answering the large number of written and oral inquiries by members of the class?

The affidavits before us are conclusory in character and they merely scratch the surface. For example, a general partner in Carlisle & Jacquelin in his affidavit states that there is no way in which his firm could identify the odd-lot customers.²⁴ Similarly, a general partner in a large member firm on the New York Stock Exchange declares that there is no ready way to separate odd-lot customers from round lot customers and that to determine which customers had odd-lot transactions in recent years would require sorting of approximately 300,000 to 400,000 names of customers.²⁵ Finally a general partner in another large member firm expresses his belief that there is no way of obtaining exact

24. Affidavit of Sander Landfield, general partner of Carlisle & Jacquelin, offered in support of motion to dismiss class action.

25. Affidavit of Dean Witter, Jr., general partner in Dean Witter & Co., offered in support of motion to dismiss class action.

information about odd-lot transactions without analyzing the history of each account, a task which would be "virtually impossible."²⁶ Nevertheless, both on argument and as part of their briefs, defendants have argued that "many (odd-lot customers) can, in fact be identified through the appellee firms and the brokerage houses."

On remand the court may find that the names of certain class members, because of their widespread dealings in odd-lots, may be readily ascertainable. Arguably these class members may possess enough of a stake in the proceedings to justify personal intervention. At this point the court will then have to consider once again the question of publication. Under certain circumstances published notice may amount to the "best notice practicable," particularly where requirement of a different form of notice would, in effect, prevent potentially meritorious claims from being litigated. In this connection we must note that in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the party required to furnish individual notice was a large banking institution and not a small individual claimant. Similarly, in other cases publication has been rejected as insufficient notice where it was sought to be used by the City of New York, *Schroeder v. City of New York*, 371 U.S. 208 (1962), the New Haven Railroad, *City of New York v. New York, New Haven & Hartford R.R.*, 344 U.S. 293 (1953) and the City of Hutchinson, Kansas, *Walker v. City of Hutchinson*, 352 U.S. 112 (1956). Nevertheless, if the court finds that a considerable number of members of the class can be identified with reasonable effort, and financial considerations prevent the plaintiff from furnishing individual notice to these members, there may prove to be no alternative other than the dismissal of the class suit.

26. Affidavit of Edwin B. Peterson, general partner in Francis I. du Pont & Co., offered in support of motion to dismiss class action.

It may be that in some situations it is better at the outset to decide that the proceeding may be prosecuted as a class action and leave for later resolution some of the debatable matters, such as the efficiency of the representation or the notice to be given, or the feasibility of meeting problems of judicial administration. In this particular case, with its millions of possible claimants, we think it would be most amiss to let the case go ahead until it becomes hopelessly entangled in a mass of procedural detail and expense from which it may not be easy or even possible to extricate it with justice to the parties by the simple means of deciding at a later day that the order permitting the case to proceed as a class action was improvidently granted.

Finally, it is worthy of note that in dismissing the action as one including "a myriad of complex, frustrating, needless problems in attempted management" the District Court in *School Dist. of Philadelphia v. Harper & Row Publishers, Inc.*, 267 F. Supp. 1001, 1006, commented that, prior to the dismissal there had been "numerous hearings and conferences."

Accordingly, the order appealed from is reversed; we retain jurisdiction, and the case is remanded for a prompt and expeditious evidentiary hearing, with or without discovery proceedings, on the questions of notice, adequate representation, effective administration of the action and any other matters which the District Court may consider pertinent and proper.

LUMBARD, *Chief Judge* (dissenting):

It seems to me that we should affirm Judge Tyler's ruling that this is not a proper class action because it is so clearly right on two counts: the impossibility of the plain-

tiff giving suitable notice and the unmanageability of this suit as a class action. I would not remand to the district court to do the obvious and the unnecessary.

What could be less of a class action than a suit where there are more than 3,750,000 potential plaintiffs living in every state of the union and in almost every foreign country? If this is a "class," it is so large and indiscriminate that a substantial proportion of its membership will have no idea whatever that they belong to it. Just how a notice can be worded which could alert so large a "class" to the possibility that proceedings in the Southern District, if carried forward, would someday enrich each one by a few dollars, if there be anything left after expenses and attorneys' fees, is a mystery to me.

Indeed, the question of how to give any notice which would be sufficient to meet constitutional requirements is so impossible of solution that my colleagues choose to ignore it.

If the plaintiff, who has participated in some 247 [corrected by Lumbard on 3/13/68] transactions over a period of years, estimates his damages at only \$70, is it not evident that the overwhelming majority of all possible plaintiffs would expect at best to receive considerably less than \$70? And what is sufficiently interesting about the expectation of such a recovery, available if at all, only after several years of litigation, to lead us to suppose that any considerable number would bother to respond to the notice. Despite articles in the May 3, 1966 edition of the New York Times and the May 4, 1966 edition of the Wall Street Journal no one has joined Eisen in this section. See *Berger v. Puro-lator Products*, 41 FRD 542, 544 (SDNY 1966). Obviously the only persons to gain from a class suit are not potential plaintiffs, but the attorneys who will represent them.

In any event, plaintiff suggests no way in which he can give notice to his 3,750,000 potential brothers-in-litigation

which could conceivably attract the attention of any appreciable number of them. Who is to advise foreign class members who do not read or understand English, and how is this to be done? Who is to pay for class notice, and for the subsequent notice of any step in the action which the Rule says must be given?

To me, these illustrations of the practical and insurmountable difficulties that would be encountered in administering this action as a class suit underscore that Judge Tyler could only have exercised his discretion as he did. As a class action the claim is totally unmanageable. See *School District of Philadelphia v. Harper & Row Publishers, Inc.*, 11 FR Serv. 2d 23.b.3, Case 1, 23.b.3-3 (E.D. Pa. April 24, 1967).

Even if all of the difficulties inherent in the administration of the suit were overcome, the amount expended in filing and processing claims would probably exceed any recovery. *Illinois Bell Telephone v. Slattery*, 102 F. 2d 58 (7th Cir.), cert. denied, 307 U.S. 648 (1939) is inapposite. In that case the telephone company had sought an interlocutory injunction against an Illinois Commerce Commission order requiring reduction of certain of its rates. The interlocutory injunction was granted, conditioned upon an undertaking by the telephone company to refund to its subscribers any sums paid by them in excess of the proposed reduced rates should the company lose its suit. The company had already collected the money and had laid it aside. The Supreme Court eventually ordered the injunction dissolved and that refunds be made in accordance with the terms of the injunction. *Lindheimer v. Illinois Bell Telephone Company*, 292 U.S. 151 (1934). The telephone company agreed to undertake the task of making refunds and to assume the costs of the distribution. The payments were not made by the Court, but by the company

under the supervision of a representative of the court. 102 F. 2d at 61.

In this case, unlike *Slattery*, the potential claimants have no direct business dealings with the parties which plaintiff seeks to hold liable, and therefore defendants are in no position to identify from their own records the potential claimants, let alone calculate the amounts of any refund that they may be found entitled to receive.

Here no one can ascertain whether any recovery will be due any particular plaintiff until the case has been litigated, and, if any recovery is decreed, there must follow an enormous number of calculations regarding the dealings of each plaintiff who is entitled to any recovery. And even after that the court would have to pass upon the expenses and fees to be deducted from any recovery.

Class actions were not meant to cover situations where almost everybody is a potential member of the class. Nor were they ever intended to compel any court to entertain an alleged controversy with so many potential parties, or to compel any court to entrust the interests of numerous plaintiffs to representation by one plaintiff whose interest is all of \$70. Rule 23(b)(3) requires that a class action be superior to other available methods for the fair and efficient adjudication of the controversy, and requires that the court consider "the difficulties likely to be encountered in the management of a class action" in making its determination. See *Berley v. Dreyfus & Co.*, 11 FR Serv. 2nd 23.b.3, Case 6 (SDNY Dec. 22, 1967). While this court has determined that dismissal of the class action "will for all practical purposes terminate the litigation," 370 F. 2d at 121, Rule 23 does not require or contemplate that courts will hear causes of action as class actions merely because they will not get to hear the case any other way. As the Advisory Committee's Note suggests, "one or more actions

agreed to by the parties as test or model actions may be preferred to a class action * * *'' If plaintiff's case has any merit and his counsel are of excellent calibre, as he asserts, I see no insuperable barrier to organization by plaintiff, with the assistance of counsel, of a group of members of the purported class to sponsor this litigation as a test case with Mr. Eisen as the sole plaintiff. Even if a test case is not financially expedient from the viewpoint of plaintiff and his legal advisors, its obvious administrative advantages compel me to reject the unmanageable class action as an alternative. See *Richland v. Cheatham*, 11 FR Serv. 2d 23.a.52, Case 2, 23.a.52-12 (SDNY July 27, 1967).

Even if plaintiff is unable to maintain an action, when a controversy touches the interest of so many members of the public it is sufficient that Congress has provided a public agency whose duty it is to supervise and regulate such matters. Comment, *Recovery of Damages in Class Actions*, 32 U. Chi. L. Rev. 768, 785 (1965). The matter of proper commissions to be paid by those who engage in odd-lots transactions is within the jurisdiction of the SEC. It has been the subject of study and in due time the Commission will take appropriate action.

The appropriate action for this Court is to affirm the district court and put an end to this Frankenstein monster posing as a class action.

**JUDGMENT OF UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT
DATED MARCH 8, 1968, REVERSING
AND REMANDING.**

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

No. 78—September Term, 1967.

[SAME TITLE]

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded to said District Court for the proceedings in accordance with the opinion of this court with costs to the appellant.

A. DAVID FUSARO,
Clerk.

**TRANSCRIPT OF RECORD OF PROCEEDINGS
DATED APRIL 30, 1970.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

New York, New York
April 30, 1970—2:15 P.M.

Before:

Hon. HAROLD R. TYLER, JR., District Judge.

Appearances:

Mordecai Rosenfeld, Esq., Attorney for Plaintiffs.
Carter, Ledyard & Milburn, Esqs., Attorneys for Defendant Carlisle & Jacquelin, By: Devereux Milburn, Esq., Louis L. Staunton, Jr., Esq., of Counsel.
Kelley, Drye, Newhall, Maginnes & Warren, Esqs., Attorneys for Defendant DeCoppet & Doremus, By: Francis S. Bense, Esq., of Counsel.
Milbank, Tweed, Hadley & McCloy, Esqs., Attorneys for Defendant New York Stock Exchange, By: William E. Jackson, Esq., of Counsel.

The Court: Gentlemen, I am sorry that we have to proceed in this somewhat foreboding and gloomy atmosphere, but I think because of our numbers and matters which I assume you may wish to spread yourselves out a bit and ask a few questions of a few witnesses.

Now, where are we going? In what direction do we proceed today from your point of view?

Mr. Rosenfeld: As I understand it, the defendants are going to offer witnesses on the manageability question?

The Court: What about you, do you wish to offer any witnesses?

Mr. Rosenfeld: I do not, your Honor.

The Court: At least for the nonce, let us assume. It may be that you may want to change your mind.

Mr. Stanton: I think our program, your Honor, for the other side of the case was to first offer in evidence stipulations Numbers 1 and 2. You, I believe, have seen stipulation Number 1, and perhaps the original of that is already on file.

The Court: It should be, you are quite right. At least I think it should be.

Mr. Stanton: I would think on consent I could offer in evidence Stipulation Number 2, which we have previously signed and it is dated April 17.

The Court: All right, very good. Let me just check and make sure.

I am sorry to report that the file doesn't seem to have the stipulation.

Mr. Stanton: Your Honor, I have another copy.

The Court: My law clerk just reminds me of something which I have overlooked. He was correct, here it is.

Mr. Rosenfeld sent it in in March and here it is.

Mr. Stanton: I think we offer that in evidence as well, your Honor.

The Court: All right, we shall do that.

(Defendant's Exhibits A and B received in evidence.)

Mr. Stanton: We have considered, your Honor, that without a separate offer the papers on the original motion, that is, the notice of motion and supporting affidavits and

opposing material are also open to consideration as part of the record before you.

The Court: I would think so. I don't think we have to mark them as exhibits. They are part of the file. I would think both you at the back table and Mr. Rosenfeld would agree that that is still before the Court, as it were.

Mr. Stanton: That includes, then, your Honor, Plaintiff's answers to interrogatories, which were similarly part of the file.

The Court: Yes, because it seems to me that what really is involved here, to coin an old state practice phrase, in the present posture of our case really brings up the whole record so far.

Mr. Stanton: That is the way we viewed it.

The Court: Yes, I don't think anybody would disagree with that.

Mr. Stanton: Then I think that all we have to add this afternoon are two witnesses, each of whom we expect will be rather brief and we are prepared, if your Honor would like us to do that.

The Court: Fine.

Mr. Stanton: May we have Mr. Paul Martin, please.

PAUL ROBIN MARTIN, called as a witness having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. Stanton:

Q. By whom are you employed, Mr. Martin? A. Walston & Co., Inc.

Q. What is your position with Walston & Co., Inc.? A. Vice-president, manager of systems and programming.

Q. What does that responsibility include? A. The design and implementation of automated brokerage systems at Walston & Co.

Q. For how long have you been familiar with Walston & Co.'s data processing and automated systems? A. Approximately nine and a half years.

Q. Is the system at Walston & Co. generally typical of those of other automated houses, brokerage houses on the street, to the best of your knowledge? A. Yes, sir, it is.

Q. What is the source of your knowledge in that connection? A. The greater part is my experience at Walston, but also through discussion with my colleagues on Wall Street through the years. In the capacity as a programmer et cetera, up through the capacity of manager of the systems and programming department.

Q. Would you describe for the Court, please, the steps or processes which would have to be gone through in order to supply for any customer of Walston his odd lot purchases and sales for a given period of years, say roughly a period of four years extending backwards from 1967? A. Well, assuming that we would be supplied the customer identifier, such as an account number, we would have to take a short period of time to determine the criteria by which—that we would use. The elements of the program that would have to be written to scan the available files that we do have in our records, magnetic tape files, that is.

We would have to prepare this program and actually apply it against these files in the appropriate number of runs. Each year would consist of a separate file and we would have to run against—the file for each year, extracting again the appropriate information for each client.

Q. Let me be a little clearer about the appropriate information. You would prepare a program, a key to the

customer's account number? A. Yes.

Q. Would there be a cost for preparing that program?

A. Yes, there would be.

Q. Can you give a fair estimate of the cost or a range of figures, perhaps? A. We are talking about probably a program that would take a week to write and implement, so we are talking about 500 to a thousand dollars in cost.

Q. That would prepare a program of search for the tapes containing the files for the years? A. That's right, yes.

Q. And then that program would be applied against each year's records? A. That's right.

Q. I think you told us the records were stored in magnetic form on tape. A. That's right.

Q. How many tapes are there for each year or approximately how many? A. Approximately 20 to 25 tapes per year.

The Court: You say the cost would be what, I didn't get that figure?

The Witness: Approximately \$500 to \$1000 to prepare the program to perform this search.

Q. So for the years 19—for a six-year period, you would have to search approximately 120 reels of tape? A. That is right, yes.

Q. How long would that process require? A. Oh, probably 12 to 15 hours continuous running time.

Q. Is there a cost for that? A. Oh, yes.

Q. What would that cost? A. That would depend upon the computer that we used. Again, also the length of time it would take would depend on whether it was a high performance computer or one of our lower performance, but I would say an average cost would be about \$200 an hour. That is minimum. Not including the cost for the operator and materials or whatever would be involved.

Q. What types of materials are involved? A. Well, this would have to be output in a paper form for reference. That would be pretty much the extent of it.

Again if this program was to not only put it output on paper, but if it had to be referred to again, instead of going through the entire files, one might want to put it out in magnetic tape as well for just the information that we did extract from the original pass.

Q. That would be an additional cost, I suppose? A. Yes.

Q. So without regard for employee's time or for such materials as paper, the search for the account number through the reels for the years involved would cost about \$3000, is that a fair statement? A. That's right.

Q. Would the printout be completely accurate or would you regard it as completely accurate when that process was done? A. I would have to say 99.9 per cent accurate because it would include original transactions as well as cancellations and this type of thing to an original transaction, so that if one of these items was lost in some way through the years, not from the tape but it was never handled properly, cancelled, or something of this sort, it wouldn't match against the original transaction. These are kind of subtle errors that can happen, you see.

Q. But the process would produce a result with a very high degree of accuracy? A. Yes, it would.

Q. Such a high degree of accuracy available to firms not as fully automated as Walston & Co? A. It would depend on their records. It may be, but it couldn't be achieved as quickly.

Q. Or as cheaply perhaps? A. Or as cheaply, I would assume that.

Q. Would Walston have any difficulty in making available 15 hours of computer or machine time? A. Yes, we would.

Q. Why is that so? A. Well, we are in a period now implementing larger systems and at this time we couldn't afford to use that time for something other than the more or less research and development that we are doing to get ourselves out of a somewhat of a, you know, system that is kind of half second generation and half third generation computers.

Also operations uses a great deal of the time for their day-to-day business.

Q. If after receiving such a request and making such a search for one customer, another customer should ask you for similar information with regard to himself, would the process have to be repeated? A. Yes.

Q. How would the cost of such a job be handled? Would Walston absorb it? A. No, I don't think we could, of course not.

Q. Would you charge that back to the customer? A. We would have to.

Q. Or decline to perform the work without assurance of payment? A. Yes.

Q. This process, as you described it, I gather would not deliver to the customers his actual confirmation slips for the trades involved? A. No.

Q. It would simply inform him that there had been such trades as far as you knew? A. That is right.

Q. Since we raised this question with you, do you know whether the management of Walston & Co. has considered whether they would undertake the work of hunting for this kind of information if they were requested to do so? A. It has been considered.

Q. Have they decided? A. Yes, I would say pretty much.

Q. What was the decision? A. That we would decline to do anything like this.

Mr. Stanton: That is all. Thank you very much, Mr. Martin.

The Court: I take it you mean by that, Mr. Martin, that you would decline any customer who asked this save for some commitment on his part to pay reasonable costs?

The Witness: No, we would decline to do it regardless of the cost.

The Court: Could you enlighten us as to the reasons for that?

The Witness: This would be a special service for the particular client or clients at a time when costs are high and income is quite low. You would refrain from doing this. It is just something that we won't do unless we were forced to comply with something like this.

Mr. Stanton: Perhaps I should ask this.

By Mr. Stanton:

Q. Would this require changing of employees from their current functions to doing this? A. At this time, yes, it would.

Q. In how constant operation are these machines now? A. These machines run 24 hours a day close to seven days a week. On the weekend we are using them a great deal for testing and things of this sort, because we can't get the appropriate time during the week.

Mr. Stanton: Thank you.

The Court: Mr. Martin, I think I would like to ask you this question: If one were to assume that a customer would be willing to pay not only the total direct

cost for such a search, but as well the indirect or perhaps I might call them the overhead costs allocable to the job, would it be something that your management would still decline on the grounds that you just could not put yourself in a position to offer this service to one with the thought that this might lead to more—I am not putting this very well—but you see what I mean?

The Witness: In other words, setting a precedent.

The Court: You wouldn't want to set a precedent, I take it, from what you say?

The Witness: Yes, this is a good part of it also.

The Court: I gather also that you are saying that aside and apart from considerations of cost, the allocable time for usage of your computers is already so strained that absent a total new investment in other computers, you really couldn't handle it?

The Witness: That is true at this time.

The Court: All right.

Any other person at the back table who wishes to question him?

Mr. Jackson: No, your Honor.

The Court: Mr. Rosenfeld.

Mr. Rosenfeld: I have just a few questions, your Honor.

Cross-examination by Mr. Rosenfeld:

Q. Mr. Martin, you described a cost of \$3,000. I did not understand, was that \$3,000 per individual or \$3,000 for a whole operation? A. That would be \$3,000 for a pass

through that period, whether it was one individual or a group of individuals. Again it depends on the criteria with which the program is designed.

If we are told or it is determined that, say, one account number will be used and we made the pass, it would cost as much for one as it would, say, for a group.

Q. Cost as much for one as for what? A. As for a multiple accounts. There would be extra costs because of materials because we would derive more output from more than one.

Q. How much would it cost, if you could estimate to do this for all your customers? The \$3,000, was that the sum total of costs for all your customers, if you did it in one operation? A. That would be the cost to make a complete pass through that particular period of magnetic tapes. There would be extra cost—there might be more cost if we were out putting, say, the data for more than one individual. In other words, if we went through this file for one person, it would have to cost, I feel, at least \$3,000. If there were two customers, it would mean more paper to print on, the output, but the machine time would be approximately the same so, therefore, the cost for the machine, the use of the machine, would be the same for two as it would be for one.

Q. How many customers does Walston have, roughly? A. You are saying now if we did this for all our customers?

Q. Right. A. Oh, approximately 250 to 300,000 active customers. I would say something of that sort.

Q. Could you give us some kind of estimate of what the cost would be if you did this process for all your customers? A. The cost would be probably—well, let me put it this way: Each customer more or less subscribe to this pass that we are going to do, say, it would have to be key punched on a card or something of this sort to get his number and there would be data processing involved with that. If we start to go now to a greater number of customers,

I would have to figure out pretty much the card costs and this kind of thing. Say one pass would be very roughly say 4,500 or \$5,000, something of this sort, because of the great amount of output. We are virtually almost printing a great part of that file now that we are passing against because the more customers naturally the more we are going to be extracting from there and printing, so there would be a tremendous amount of printed output and I would have to look at paper costs and this kind of thing to get an idea.

Q. Have you any idea what the time involved would be if you had to do a run for all your customers? A. No, I wouldn't. I would have to determine how much printed output there would be, and this is the slowest part of it, printing out all of this information.

Q. Would it be a very laborious task? A. I would say yes.

Q. You mentioned, Mr. Martin, that the process would be somewhat slower or slower for firms not as automated as Walston & Co. Are there firms not as automated as Walston & Co.? A. Yes.

Q. Do you know whether there are a significant number of firms not as automated as Walston & Co.? A. You are talking about the total number of brokerage firms?

Q. Yes, sir. A. A great deal are not as sophisticated as Walston & Co. But then again they offer special services. They are smaller firms, naturally they may not qualify for large-scale computers and things of this sort.

Q. Would you have any idea how firms less automated than Walston & Co. would go about this task of finding odd lot transactions? A. I would have to know how they maintained all these pass files, in what form, before I could determine how they might go about it.

Mr. Rosenfeld: That is all I have, your Honor.

The Court: All right.

Mr. Stanton: That is all we have, your Honor.

The Court: Thank you, Mr. Martin. You may be excused.

(Witness excused.)

Mr. Bensel: May it please the Court, my name is Mr. Bensel, I have requested Mr. Jeremiah Murphy, chief deputy clerk of this court, to appear here today and explain to the Court some of the problems that he and Mr. Livingston have encountered in dealing with problems incident to class suits. In the opinion of the Court of Appeals, Judge Medina stated, among other things, the defendants may be able to present data indicating that in analogous situations large sums have been absorbed by paper work, fees of special masters, printing, postage and so on.

He also said in talking about identity of memorandums of the class and I quote, "Until it is answered how is one to give any rational consideration to the question of what notice by publication would be deemed appropriate and what should be stated in the notice, and who is to take on the burden of answering the large number of written and oral inquiries by members of the class?"

I would like to ask Mr. Murphy to take the stand and testify as to problems that they have encountered in connection with the current drug case.

The Court: All right.

I am not sure this is a typical experience for Mr. Murphy, we will have to ask him that.

JEREMIAH A. MURPHY, called as a witness, having been first duly sworn, testified as follows:

Mr. Bensel: Your Honor, for the Court's information and guidance I have here a copy of the order in the case of Alpine Pharmacy and other plaintiffs against Charles Pfizer, et al., No. 69 Civ. 559, and twelve other wholesaler-retailer actions now consolidated. This order is entitled "order directing Rule 23(C)(2) notice to certain class members (retailers and wholesalers)," and since this is a document on file in the officer [*sic*] here, I would suggest that we might, for the purpose of this witness's testimony, have it marked in evidence so that we are conscious of what problems they were dealing with.

Mr. Rosenfeld: I have no objection, your Honor, but I have never seen this.

Mr. Bensel: It is from the clerk's office.

The Court: That is one of the cases, is it not, before Judge Wyatt?

Mr. Bensel: That is correct, your Honor.

(Defendant's Exhibit C received in evidence.)

Mr. Bensel: This order, which has now been marked Exhibit C, your Honor, provides for a form of notice attached as Exhibit A to be directed to the members of the consolidated wholesaler-retailer class, as defined in a prior order of Judge Wyatt.

The order further directs that individual notice be sent to that group. I don't have available the actual number of members of that class although the information that we had from counsel involved indicates that there were some 40,000 in that retailer-wholesaler group.

The Court: It seems to me I recall in the releases which are sent out officially by the multidistrict litigation panel that something in the neighborhood of that number was recited in its discussion of this particular case; that there were approximately 40,000.

Mr. Bensel: That is my understanding and it could be, I think, ascertained if somebody were to count the names appearing on the proof of mailing, but we haven't actually done that.

I have also and I would like to offer two of the notices that were published in connection with the Pfizer case.

(Defendant's Exhibits D and E received in evidence.)

Direct examination by Mr. Bensel:

Q. Mr. Murphy, I think the record shows your position here. You are the chief deputy clerk of the United States District Court, Southern District of New York? A. That is correct.

Q. You have heard these brief comments of mine in connection with the so-called drug litigation? A. Yes, I have.

Q. I have had marked here as Exhibit C certified copy of the order directing notice to certain members of the class there involved and as Exhibits D and E notices that were sent out to consumers of certain broad spectrum antibiotics, as well as a notice of a proposed compromise to consumers of certain broad spectrum antibiotics.

Could you state to the Court, as a result of the notices that went out to members of the class in the drug case, both individual notice and published notice, the experience of the clerk's office in this court in respect to the responses

or calls relating to those notices? A. Well, all during last summer after these notices went out—

Q. Keep your voice up. A. At its inception when these notices went out some time in June, or various papers in these cases, not only notices, we received an ever increasing number of phone calls directed to the clerk primarily because I believe the notices were in his name in a lot of these instances or they said file claims in mail boxes and so forth, post office boxes that were in the name of the clerk, and there were all these letter inquiries by people asking to explain what the notices meant, how long it would take to get paid, of every conceivable nature from all over the country.

Of course, we only have a few lines there—

Q. A few lines in the clerk's office? A. Right, and we would suggest that as it had been arranged with the various firms of attorneys, we would turn them over and request that they get in touch with the attorneys as to the status of the preceeding as we had been instructed to do, but many times people were adamant about speaking to the man who had signed the notice, not knowing that he didn't know the up-to-the-minute status of the case, and so forth.

That was one of the things that tied us up quite a bit last summer.

Q. You say you had a number of calls? A. Yes.

Q. Over how long a period would you say was the bulk of those calls being received and can you give us any idea of how many of them? A. Well, in July and August when I was there it seemed it was continuous all day long and we would answer the phone and then we would have to dig out the addresses who to route these calls to and so forth, and the different firms, ask what status they were in, or what class they were in, and some of them even asked what exclusion meant.

Q. Exclusion? A. Yes, a word like "exclusion" and so forth. What were their rights, when would they get paid.

As I recall, my actual experience, this is what happened.

Many of the claims were sent directly to the court house instead of to the mail boxes that were assigned to each state. There was a mail pouch or box for each state because of certain classes. They would come in registered mail to the clerk, we had a girl listing these sometimes for a few hours at a time just acknowledging receipt of these and putting them in our book.

Q. Would you like to route them out? A. We would have to route them to the various firms, like the attorneys for plaintiff and so forth, who would reroute them.

Even up until this day we get quite a few inquiries. For example, the mail strike, the Judge had set a big hearing on March 24, I believe, and these fellows would get on the phone, say we can't write, we want to be heard, we have to have our notice in that we want to be heard, will you make a record of it. Some fellow called from Kalamazoo, Michigan, "I have emphysema, I don't know if I can get in. Will you take my name and address." And stuff like that. It is just of every type and nature.

Q. Do you remember telling me of a recent call you had collect from Alaska? A. That was in another case. You know we always have three or four of these cases going at one time, or five. Some stockholders actions and some are class actions and this woman called collect, Mr. Livingston got the call, and she wanted to know what "exclusion" meant. What if she agreed to be excluded, what would it mean, and so forth.

First of all, he said we can't take the call collect and then she called up and paid for it.

Q. Have you had inquiries from other individuals in connection with these notices that went out? A. We have

had many. Congressmen would write in and want to know why their constituents hadn't been paid. We would route it to the law firm who would like to wait until there was a hearing to clear the air a little so they could tell him something definitive and then he would write and say, please have the courtesy of answering me, to the clerk again, as it was kind of agonizing in itself.

Of course, we did the best we could with the help we had. It was a little slow, but it had an impact on them.

Q. When you received letter communications from so-called members of this class, do I understand that somebody in the office, the clerk's office, has to make an entry of the receipt of the letter and the disposition of it? A. Well, if it is a registered letter we always make a record of it.

Q. During the height of the calls and mail on the drug case last summer, was there one or more persons in the clerk's office devoting full time to handling that mail and those phone calls? A. Well, it was divided up among a receptionist, a secretary, myself or Mr. Livingston, and if one of the pieces of mail was a little intricate, we would look at it and try to determine or we would call up the attorneys and say we would have to give this a little priority because there may be a time element, or something involved, but we couldn't answer on it. We weren't that familiar with it.

Mr. Bense! : That is all, Mr. Murphy. Thank you.

The Court: Mr. Rosenfeld?

Mr. Rosenfeld: I have no questions, your Honor. I do want to say that I have not seen Exhibits C, D and E. While I don't expect I would have anything to ask when I do see them—

The Court: Mr. Bense!, I am sure—

Mr. Bensel: I will gladly give you copies of them. If you want to borrow these now, you can take them.

The Court: He wants to look at them now.

Mr. Bensel: They are very short.

Mr. Rosenfeld: I have no questions, your Honor, except I would ask Mr. Bensel to send me a copy of these at his convenience.

The Court: Yes, fair enough.

Let me ask you something, Mr. Bensel, are we to understand that these are photocopies or are these actually the court file copies?

Mr. Bensel: Photocopies of the court papers. The stamp is on them.

The Court: Fine. Then presumably some time ago—

Mr. Bensel: What I would suggest doing, if I may, is I will have copies made of these and I will send these actual exhibits back to your Honor, and I will give a copy of them to Mr. Rosenfeld.

The Court: Very nice. Thank you, Mr. Jerry Murphy, you may step down.

(Witness excused.)

The Court: I take it from what Mr. Milburn said earlier that Messrs. Murphy and Martin were the only two witnesses that you wished to present.

Mr. Bensel: That is correct.

The Court: Are we in a position where we can agree that there is no more evidence, if you will, that either the plaintiff or the defense wants to bring to bear?

Mr. Rosenfeld: I have none, your Honor.

Mr. Stanton: I think that is right, your Honor.

The Court: There is one thing I am a little embarrassed to raise, but I think it must be confronted particularly since in rereading the majority opinion in the Court of Appeals they talk a great deal about it, and indeed I am afraid I talk about it a little in that memorandum of mine that I wrote, lo, so many years ago, and that is this: I suppose it is relevant to ask you, Mr. Rosenfeld, since you are new to the case, whether it wouldn't be wise if you were to submit an affidavit here some time soon, setting forth your experience and sterling qualities without any bashfulness on your part, because from time immemorial, although this has been criticized by certain courts, those very courts that criticize it then rely on it later to make a decision, namely, the competence, experience, knowhow or whatever of counsel for the plaintiff who is seeking to represent the putative class.

Now, perhaps all your friends at the back table know you well. I am sorry to say that I do not know you except from our previous hearings, which we didn't get into your sterling qualities, which I am sure are numerous, but do you see what I am trying to say?

Mr. Rosenfeld: I do, your Honor. I will prepare such an affidavit.

The Court: I notice that Judge Medina and Judge Lumbard in their opinions both dwell on this, and though I am afraid, though I haven't dared read it, the opinion of Tyler, J. dwells in some aspects of this, perhaps, I don't know.

It might be beneficial to you in case the defendants seek to urge that you are a Johnnie-come-lately with

no real experience, and so on. Embarrassing as this is, I think we have got to have something in the record on it.

Mr. Rosenfeld: I appreciate that, your Honor.

The Court: All right, now, gentlemen, what is your pleasure? I am reading with some dismay that the Court of Appeals in its opinion said, and the case is remanded for a prompt and expeditious evidentiary hearing, which I am sure they meant in utmost good faith.

Of course, all of us know pretty well the history of this great affair since that opinion was written and I think it is perfectly fair to say that it is nobody's fault that we are here today on April 30, 1970, having our evidentiary hearing.

In other words, an awful lot happened that certainly was not known or contemplated by the Court of Appeals and indeed, even by counsel, or the District Court, but I think we have got to see if we can't complete this.

I would like some briefs from you. I hope you don't mind my saying that.

Mr. Bensel: We would be happy to submit them. In fact, we desire to submit them.

The Court: Can we agree on a schedule. I think that is about all we can do today, isn't it?

Mr. Bensel: That is correct.

Mr. Stanton: Your Honor, independently I might perhaps suggest one alternative. I haven't even dared to raise with co-counsel because of its temerity, it might be of assistance to you if instead of submitting a brief on the law, with which we believe your Honor is well

familiar, we proposed findings of fact and conclusions of law.

The Court: That I think is an excellent idea from my point of view, and in fact I was just about to suggest that if I were left to my own devices, that is what I would prefer.

I do note that the Court of Appeals,—I had forgotten this—seems to think that I didn't quite understand the law, but after saying that, they seem to go off on other things and besides, I think so much time has gone by and so many cases have been written with which I am quite sure every one of us are pretty familiar, I frankly would prefer that.

Mr. Rosenfeld: Your Honor, I don't think that there is much dispute as to the facts. Witness the fact that stipulations were easily signed, and that the testimony today is not testimony that I challenge by cross-examination.

In my view of the case, the facts are less controversial than the law, and I was anticipating asking your Honor for something like four weeks in which each side could perhaps exchange briefs because I think from my point of view the main issue here is legal, not factual. I don't think there is a factual issue here.

The Court: Perhaps in this sense I, at least, would agree with you: The evidentiary facts I don't think from all I have seen and heard from all of you are very much in dispute. As you say, witness the stipulation.

You were nice enough not to indicate this afternoon that you doubted the veracity of our witnesses and so on and so on. I think, however, there are some ultimate

facts, if I may put it that way, or there are mixed questions of fact and law, that is where the difference lies.

Mr. Rosenfeld: I don't want to quarrel with your Honor, but I think even on the ultimate facts, I doubt that there is a dispute. I don't think there is a dispute.

The Court: We have some difficulty, it seems to me, because if you take the opinions now in this case and I exclude what I call Eisen 1, which dealt with a different issue, but if you take the District Court opinion, the opinion of the majority in Eisen 2, and the opinion of the dissenter in Eisen 2, it seems to me it is fair to say that you have got four Judges who have somewhat differing views of where the facts leave one.

Now, that in large measure is probably, as you say, a question of law.

Mr. Rosenfeld: Right, your Honor.

The Court: But let's be blunt about it. Questions of law turn so heavily on facts, particularly ultimate facts, that I would like to ask you to consider that we adopt Mr. Stanton's suggestion and that we do have proposed findings and conclusions.

I do not think that this means, however, that if you would like to write a brief as well—

Mr. Rosenfeld: I would, your Honor.

The Court: I would have no objection whatsoever. I would welcome it. But I won't insist on it. In other words, what I would like to do is get both sides to submit proposed findings and conclusions. Then I would be happy, but if any counsel wishes to add a brief or memorandum or whatever he wishes to call it, on the law or on how to apply the law here, I would be very grateful and receive it with alacrity.

How is that?

Mr. Rosenfeld: It might be, your Honor, I don't know, I am just hazarding a guess, it might be that the parties could agree on these proposed findings of fact. It might be, because they really agreed on the second stipulation in one minute and so I don't know if your Honor would be receiving what I think is the issue in this case—

The Court: Let me put it this way, Mr. Rosenfeld. I don't mean to quarrel with you because I don't disagree very violently with anything you have said, but just one further observation and then I will be quiet.

To illustrate, I think it is fair to say that in my original opinion I felt most strongly on two questions: One, unmanageability, if you will, and two, concern about adequate notice within any reasonable realm of expense.

Isn't that a pretty fair observation from what you recall of the District Court opinion?

Mr. Rosenfeld: That was the same problem, your Honor, that the Second Circuit raised.

The Court: At least the dissent felt that way, too, and agreed with me on that.

Now, I can see a number of strands of fact, which you have already agreed to, quite fairly and commendably here, pointing to both of these points. I can see some which point to only one point, and so on.

I can see differences among counsel and reasonable differences, where do these facts go and where do they pigeonhole, one, the other or both.

For that reason, for example, it seems to me it would be useful to me to see proposed findings as well as proposed conclusions, but in any case I am

happy to have a brief as well, and you have been good enough to say you want to furnish one, and I will take it with pleasure, and perhaps with considerable edification.

Gentlemen, the real question is what do you think of Mr. Rosenfeld's suggestion of four weeks?

Mr. Rosenfeld: I think I could have a brief ready perhaps to exchange within four weeks, if the other side doesn't want to put in a brief, I guess they don't have to, but I would very much want to do it.

The Court: They heard you.

Mr. Bensel: I think we can meet that schedule.

Mr. Rosenfeld: We could be flexible if something happens. We could always impose on the Court for a few more days, but I would like to have the brief in say four weeks from now, if I could.

Mr. Bensel: Mr. Rosenfeld, when you talk about briefs, you are also talking about proposed findings?

The Court: The fourth week from now is Memorial Day or at least it is the 29th, it has big red numbers here, which means a Federal holiday.

Mr. Bensel: Mr. Stanton has a very heavy schedule. He may want to enlarge on that request for time.

Mr. Rosenfeld: I would agree to that.

The Court: What is your idea?

Mr. Stanton: For purely personal engagements towards the end of next month, June 15 would be a great deal better for me. I don't offer that with any—

The Court: The trouble is, why don't we do this: Would anybody object if we sort of settle in a little short of June 15, specifically June 10. That has a nice round ring to it.

Mr. Stanton: All right, sir.

The Court: Is that all right, Mr. Rosenfeld?

Mr. Rosenfeld: Certainly, your Honor.

The Court: The idea is that you all will file your papers now.

Mr. Rosenfeld: We will exchange papers and perhaps people might want to be allowed say, ten days to respond to the other person's papers.

The Court: If anybody wants to respond to anything, I think the thing to do is to call my chambers and we will work it out.

Frankly, I don't see any useful purpose in argument, but if anybody feels strongly about being heard in the flesh or orally, please feel free to either drop me a note or call up my chambers and say your preference, and I will respond one way or the other.

Very good, I think that covers everything for the nonce, and then we will hope that—I will be perfectly blunt about it, I am going to be here all through July, but I do hope to go on vacation some time in August, and if possible I would like to see us look to having a resolution from the District Court prior to my departing on vacation. I think it would be useful to everybody concerned if we shot for that result.

Mr. Rosenfeld: Thank you, your Honor.

The Court: Nice to see you all, and I will be in touch toward June 10, in other words.

**OPINION OF TYLER, J., DATED OCTOBER 8, 1970,
WHEREBY COURT IS UNABLE AT THIS TIME
TO DECIDE CLASS ACTION MOTION.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
[SAME TITLE]

TYLER, District Judge:

This court originally determined that this case was not an appropriate class action under Rule 23 of the Federal Rules of Civil Procedure. *Eisen v. Carlisle & Jacquelin*, 41 F. R. D. 147 (S. D. N. Y. 1966). That decision was reversed by the Court of Appeals and remanded for further consideration of factors governing the propriety of a class action. *Eisen v. Carlisle & Jacquelin*, 391 F. 2d 555 (2d Cir. 1968). Pursuant to the Court of Appeals opinion and after a long delay having no relevance to the issues,¹ discovery, conferences and hearings have been conducted to develop the information needed for reconsideration and decision. Upon consideration and reconsideration of all of the materials presented to the court, however, I am reluctantly constrained to say that certain missing pieces of information have yet to be supplied before the class action picture is complete. Put differently, I am unable to conceive of a solution of this extraordinary issue upon the present record which does not work a clear injustice upon one or the other of the parties; we have not yet clearly avoided the problem described by the appellate court in the following language:

1. Plaintiff's original attorneys were obliged to withdraw from the case because of a conflict of interest; many months elapsed before new counsel was substituted.

"In this particular case, with its millions of possible claimants, we think it would be most amiss to let the case go ahead until it becomes hopelessly entangled in a mass of procedural detail and expense from which it may not be easy or even possible to extricate it with justice to the parties by the simple means of deciding at a later day that the order permitting the case to proceed as a class action was improvidently granted." *Eisen v. Carlisle & Jacquelin*, 391 F. 2d 555, 570 (2d Cir. 1968).

Admittedly, some of the determinations necessary for the class action decision can be resolved with the information since provided by the parties, largely in the form of two stipulations. Nevertheless, the crucial issues of manageability and notice remain little more than questions; further facts not within the knowledge of the undersigned must, if possible, be gleaned with further efforts and assistance of counsel.

I.

Before the question of manageability can be resolved, certain mechanical problems of administration of this class action must be addressed. For example, will the appointment of a special master be required, and if so, what fee will be required? In processing claims, how much paper work, printing and postage is likely to be required and at what expense? What procedures should be used for intervention by other class members? What procedures should be adopted for individual class members to file claims and, more importantly, to prove the claims? Obviously, any expense figures will have to be estimates, and these estimates may be based on the experience of other courts in other cases, but figures should be related to the realities

of the present case insofar as is practicable, with full understanding that others not here mentioned may occur to astute counsel.

Also directly related to the manageability issue, the court must be assured that damages can in fact be computed if liability should be determined. Is it possible to fashion a formula for determining damages which will be applicable to the entire class as a single entity, or to appropriate subclasses as entities? If such a formula is not possible, will it be feasible to compute damages on the basis of claims filed by individual class members; approximately how many claims will have to be filed in order for such a procedure to be financially practicable?

If damages are to be determined on the basis of individual claims filed, the sending of some form of notice to the class must be assumed. Thus, the cost of such notices will have to be considered in determining how large a response will be required before the procedure will be financially practicable.

The court has considered plaintiff's proposed formula for distribution of any recovery which might result from the action. With a bow to the ingenuity of plaintiff's counsel and without commenting on the merits of the proposal, this action has not yet reached that stage. Before methods of distribution of damages can be considered, the court must first, and at this early stage, be certain that such a sum or sums may be fairly and accurately computed in the first place. Thus, the parties should address themselves to this question in detail.

II.

The second major issue remaining in the class action determination is that of notice. Counsel, of course, have

already discussed the question of notice, but there are still some details which should be filled in. If individual notice is to be sent only to those class members "who may possess enough of a stake in the proceedings to justify personal intervention", *Eisen v. Carlisle & Jacquelin*, 391 F. 2d 555, 569 (2d Cir. 1968),² how may those persons be identified and what is an appropriate cut-off point among the approximately 2,000,000 identifiable members for determining who will receive individual notice and who will not? What would be the approximate cost of various size advertisements in newspapers of national distribution? With reference to plaintiff's proposal for an enclosure in the periodic statements of brokerage houses to their customers and taking into account the probable size of an appropriate notice, what would be the cost to individual brokerage houses of printing and inserting such an enclosure? Specifically what "obligations", if any, do the New York Stock Exchange and member firms have to customers which would justify the use of such a procedure?

In summary, this court is unable to decide upon the present record the class action motion at this time, and this memorandum should in no way be construed as even a tentative view on the merits of that question. Further information from the parties will be required so that all possible aspects of the class action may be examined and determined. Accordingly, counsel are directed to appear at a conference in Room 2704 on October 16, 1970 at 1200

2. As I see it, the problem of notice is infinitely compounded in this case by the Rule provision that members desiring to "opt out" must reply in writing to that end. Rule 23(c)(2), F. R. Civ. P. Given (1) the mass of mail solicitations in the United States and (2) the known habit of the citizenry to "toss" such mail, one can be fairly certain that most specific individual notice will furnish little information concerning what members are truly concerned with the issues in this litigation.

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Noon in order to discuss the matters set forth above and any other items they deem pertinent to the class action determination. It is so ordered.

Dated: New York, N. Y.
October 8, 1970.

H. R. TYLER, JR.
U. S. D. J.

**AFFIDAVIT OF RUSSELL E. BROOKS IN
RESPONSE TO OPINION.**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

[SAME TITLE]

State of New York)
County of New York) ss.:

RUSSELL E. BROOKS, being duly sworn, says:

1. I am an attorney associated with the firm of Milbank, Tweed, Hadley & McCloy, attorneys for defendant New York Stock Exchange. I make this affidavit in response to the opinion and order of the Court filed October 9, 1970 requesting further information on the question of whether this action is to be maintained as a class action.

2. American Direct Mail Co., Inc., 350 Hudson Street, New York, N. Y., is in the business of preparing and mailing written communications to meet the needs of its clients, among which is The Association of the Bar of the City of New York.

3. I have been advised by William Holtz of American Direct Mail Co., Inc. that its charge for stuffing a single page printed notice and mailing it with first class domestic postage would be 10¢ per letter (including the postage). Mr. Holtz advised that this price would apply regardless of the number of letters to be sent.

RUSSELL E. BROOKS

(Sworn to January 11, 1971.)

**AFFIDAVIT OF RICHARD ALLAN IN
RESPONSE TO OPINION.**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

[SAME TITLE]

State of New York)
County of New York) ss.:

RICHARD ALLAN, being duly sworn, deposes and says:

1. I am an attorney associated with the firm of Kelley Drye Warren Clark Carr & Ellis, counsel for the defendant Decoppet & Doremus. I am fully familiar with the proceedings in the above-captioned matter.

2. On the 23rd day of December 1970, pursuant to an appointment arranged by Mordecai Rosenfeld, attorney for the plaintiff herein, your deponent and an associate of this firm spent the entire business day with Arthur J. Galligan at the law office of Dickstein Shapiro Dennis Silver & Galligan, attorneys for 20 states, the District of Columbia and the cities of New York and Memphis in the "Drug Cases", *State of West Virginia v. Chas. Pfizer & Co., et al.*, 68 Civ. 240 (S. D. N. Y.). We examined a random sampling of the responses received by Mr. Galligan's office pursuant to the Rule 23(c)(2) notice ordered by the Court and the subsequent sets of correspondence sent by the Dickstein firm. In addition, Mr. Galligan and I discussed, at great length, the procedure and problems encountered by his office in the Drug Cases.

3. The notice in the Drug Cases ordered by the Court, informing consumer purchasers of broad spectrum anti-

biotics products of their right to file claims or opt out of the suit, was published in every English and Spanish language newspapers of general circulation in the United States. Mr. Galligan in his affidavit of December 8, 1970, submitted by plaintiff's counsel states that approximately 42,000 individual responses were received and processed by his firm. However, Mr. Galligan informed me that 50% of the 42,000 responses received did not contain sufficient information to be accepted and required follow-up correspondence by his office seeking additional information and clarification of the information sent. It appeared to your deponent from our examination of these responses that from 10 to 15 percent of those persons, who were required to answer Mr. Galligan's inquiry, failed a second time to provide sufficiently adequate responses and this necessitated additional correspondence by Mr. Galligan's office.

4. From our examination it also appears that approximately 80% of the claim letters received indicated that the writer was only able to provide an approximate cost of the broad spectrum antibiotics purchased for the following reasons: (1) they had no records of the drugs purchased (2) their druggist refused to supply the information (3) the drug store, from whom they normally purchased their drugs, had ceased doing business (4) their doctor could not or would not supply them with the information.

5. There were many claim letters in Mr. Galligan's files that requested additional information or provided totally inadequate responses that did not have attached any subsequent correspondence either answering the inquiry or seeking the necessary further information.

6. During the months immediately subsequent to the publication of the Rule 23(c)(2) notice, Mr. Galligan informed me that he received several hundred telephone calls

from individual consumers and attorneys throughout the country seeking technical legal information with regard to the notice including the nature of the claims asserted in the complaints, the right of a consumer to opt out, the liability of a consumer for costs and expenses if he did not opt out and other related questions. [See Also in this regard: New York Times, December 11, 1970, *A Class Action Raises an Issue*, Metz, Exhibit I attached hereto]. He also informed me that several thousand telephone calls were received by his office, but these were handled by "bright, intelligent people" who had been "trained to respond" by Mr. Galligan. Mr. Galligan informed your deponent that for the last few years he has devoted his total time to the Drug Cases.

7. Mr. Galligan informed your deponent that it was his belief, based upon his extensive research and experience in the Drug Cases, and his knowledge of the facts in the instant matter, that the minimum notice that would be necessary to fulfill the constitutional requirement of Rule 23(c)(2) and, in addition, be the best notice practicable in the instant litigation would be the "bulk" mailing of notices to identifiable purchasers or sellers of odd-lot shares and publication in substantially the same number of newspapers as required in the Drug Cases. He would not comment on the number of times it would be necessary to publish a Rule 23(c)(2) notice for it was clearly obvious, upon examination of his files, that a substantial number of those persons who filed claims had learned of the drug suit and the necessity of filing a claim by reason of announcements on radio, television, publicity by local public officials and claim forms published in local newspapers.

ADVERTISING COSTS

8. Pursuant to a telephone conversation with Arnold Berman of Compton Advertising, Inc., 625 Madison Avenue,

New York, New York, the attached letter and rate sheet (Exhibit I A and B) were submitted to your deponent as an example of the cost of publication for one (1) black and white "notice" to be published in the regular news section of the major circulating newspapers in the following cities: New York, San Francisco, Los Angeles, Chicago, London, Paris and Rome. The national edition of the Wall Street Journal is equivalent in circulation to the total circulation of the Journal's eastern, mid-western, pacific and south-western editions. As appears from page 2 paragraph 3(a) of the affidavit of J. Paul McGrath dated August 20, 1970, submitted by the plaintiff's counsel, the cost of publishing the Rule 23(c)(2) notice (Exhibit II F, herein) in the Drug Cases was \$129,848.29.

PRINTING COSTS

9. (a) Pursuant to a conversation with Richard B. Tyrrel of Benj. H. Tyrrel, a printing company located at 110 Greenwich Street, New York, New York, the attached printing estimate (Exhibit II and II A, B, C, D, E, F) was submitted to your deponent.

9. (b) The printing cost, as outlined in Exhibit II, for 2 million copies of a notice to be mailed to purchasers and sellers of odd-lot shares are based upon (a) a notice proposed by the attorney for the plaintiff (Exhibit II A); (b) a verified claim form proposed by the attorneys for the defendants (Exhibit II B); (c) a notice to all purchasers and sellers of odd-lots proposed by attorneys for the defendants (Exhibit II C); (d) the notice to all wholesalers and retailers and the verified proof of claim form ordered and mailed by the Court in the "Drug Cases" (Exhibit II D); (e) the published notice, ordered by the Court, of the proposed compromise in the "Drug Cases" (Exhibit II E); (f) the published notice to consumers, ordered by the Court

in the "Drug Cases", advising the consumer of his opportunity to opt in or out, his opportunity to file a notice of claim and setting for the information required to be filed (Exhibit II F); the use of 9 point type for all notices, printing to be done on both sides of each printed page and each page to be folded and ready for insertion and mailing.

9. (c) The cost of printing 2 million copies of each type of notice is as follows:

Exhibit II A	the notice to all purchasers and sellers of odd-lots proposed by the attorney for the plaintiff	\$ 9,350
Exhibit II B	verified claim form proposed by the attorneys for the defendants	\$ 9,400
Exhibit II C	notice to all purchasers and sellers of odd-lots proposed by the attorneys for the defendants	\$ 9,375
Exhibit II D	the notice to all wholesalers and retailers and the verified proof of claim form ordered to be mailed by the Court in the "Drug Cases"	\$22,425
Exhibit II E	published notice of the proposed compromise to consumers, ordered by the Court, in the "Drug Cases"	\$ 9,425
Exhibit II F	published notice to consumers, in the "Drug Cases", affording them the opportunity to opt in or out, file a notice of claim and setting forth the information required to be filed as ordered by the Court	\$ 9,425

RICHARD ALLAN

(Sworn to January 11, 1971.)

(Exhibits omitted.)

**AFFIDAVIT OF MORDECAI ROSENFELD IN
RESPONSE TO OPINION.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

Mordecai Rosenfeld, being duly sworn, deposes and says:

I am the attorney for the plaintiff in the above case. I am submitting this affidavit in response to the Court's opinion dated October 8, 1970 requesting, among other things, the cost of publishing a Rule 23 notice.

An advertising manager at the Wall Street Journal estimated that it would cost about \$950 to publish the notice suggested by plaintiff (Reply Br., p. 27; annexed hereto for convenience) as a legal notice in the national edition of the Wall Street Journal. The national edition includes the Eastern, Midwest, Pacific Coast and Southwest Editions. A single publication in the Eastern edition would cost, he estimated, about \$300. The figures he gave were both estimates; a final price could not be given until the notice is actually set in type.

Mordecai Rosenfeld

(Sworn to January 8, 1971.)
(Exhibit omitted.)

**AFFIDAVIT OF ARTHUR J. GALLIGAN IN
RESPONSE TO OPINION.**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK****[SAME TITLE]**

State of New York)
County of New York) ss.:

Arthur J. Galligan, being duly sworn, deposes and says:

I am a member of the law firm of Dickstein, Shapiro & Galligan, attorneys for twenty states, the District of Columbia, and the cities of New York and Memphis in the *Drug Cases*, *State of West Virginia v. Chas. Pfizer & Co., et al.*, 68 Civ. 240 (S. D. of N. Y.). I am personally familiar with the way the consumer class action aspect of the *Drug Cases* has been maintained.

The class action aspect of the *Drug Cases* concerns a recovery made on behalf of all consumers who purchased broad spectrum antibiotic products from 1954 to 1966. While there is no precise way of fixing the size of that class, it has been estimated that the class includes some 150 million persons, located in every state of the Union (except the seven states that opted-out) and Puerto Rico. I am submitting this affidavit to set forth the costs and mechanics of maintaining the *Drug Cases* consumer class action.

I. The Background

Defendants had agreed to settle the *Drug Cases* for a total of \$100 million; \$37 million of that was allocated to the class of individual consumers. It was agreed, too, that

defendants would advance the expenses of maintaining and settling the class action, with the amounts so advanced to be deducted from the settlement fund if and when the settlement was ultimately approved. A description of those expenses follows:

The total expense of maintaining and settling the *Drug Cases* consumer class action will be, basically, about \$285,000. Those expenses can be divided into three categories: (1) The expenses of the Rule 23(c)(2) notice (the notice providing for filing of claims and opting-out); (2) the expenses of the Rule 23(e) notice (the notice of the settlement hearing); and (3) the expenses of handling and processing the claims submitted by individual members of the consumer class. The detail of each expense item is included in the affidavit of J. Paul McGrath, submitted in the *Drug Cases* and annexed hereto as Exh. A.

II. The Rule 23(c)(2) Notice

A notice pursuant to Federal Rule 23(c)(2), informing class members of their right to file claims or opt-out of the class, was published in every English and Spanish language newspaper of general circulation published in the United States (a copy of the notice is annexed as Exh. B); the total cost was \$129,848 (see Exh. A, p. 2, ¶3(a)). It should be noted that in response to that Rule 23(c)(2) advertisement 42 individual consumers served notices opting-out (Opinion of Judge Wyatt dated June 24, 1970 (Opinion No. 36,901) at p. 37).

III. The Rule 23(e) Notice

Following publication of the Rule 23(c)(2) notices, a notice of the settlement hearing was published pursuant to Rule 23(e). The Rule 23(e) notice was published, by order of the court, in the two newspapers of largest circula-

tion in each state. The total costs of that publication was \$29,984 (see Exh. A, p. 3, ¶ 3(b)). In addition, the Rule 23(e) notice was sent to each individual consumer who had filed a claim. Those expenses were: \$1,943 for printing envelopes; \$6,300 for the preparation of the consumer class mailing list; and \$7,141 for duplicating and mailing the notice to members of the consumer class. In addition, approximately \$8,535 of general expenses (cost of post-office boxes and the expenses of an escrow agreement) have been allocated to the consumer class. (See Exh. A, p. 5, ¶ 5.) The total expense to the consumer class for the Rule 23(e) notice and miscellaneous expenses was thus about \$53,000.

III. [sic] Processing the Claims

The third category of expense concerns the expense of processing the claims filed by individual consumers. As of August, 1970 we had received \$65,000 for processing consumer claims; my estimate is that the total expense will be about \$100,000.

Some 42,000 individual claims, representing total drug purchases of approximately \$17 million, have been filed; they have all been processed by my law firm. We have established our own filing system, which we keep in our office. In order to facilitate the processing of claims, we have devised a refund form (annexed as Exh. C) and a form for responding to claimants (annexed as Exh. D). At any rate, since we've done all the work ourselves (although, of course, we've hired extra personnel) no special master has yet been appointed, or been found necessary.

As for paying the claims of the individual claimants, we are recommending to the Court that each claimant be paid the same fixed percentage of his total drug purchases. In reviewing the claims, we have established three categories: Category A contains those claims we are recommending be

Affidavit of A. J. Galligan

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paid in full; Category B contains those claims we are recommending be disapproved; Category C includes those claims we are recommending be approved in part. In order to make sure that the claims are valid, we are reviewing each claim where the total purchases exceed \$1,000; and we are spot checking all the others.

Arthur J. Galligan

(Sworn to December 8, 1970.)

(Exhibits omitted.)

**AFFIDAVIT OF MORDECAI ROSENFELD IN
RESPONSE TO OPINION.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

Mordecai Rosenfeld, being duly sworn, deposes and says:

I am the attorney for plaintiff. I am submitting this affidavit, which outlines my qualifications, pursuant to the Court's request.

Academically, I was graduated from Brown University magna cum laude in 1951; I was elected to the Phi Beta Kappa in my junior year; and I was a James Manning Scholar and a Francis Wayland Scholar (both for academic achievements). I was graduated from Yale Law School in 1954; while class standing was not precisely determined, I believe I was in the top quarter of my class.

From February, 1955 until June, 1957 I was associated with Messrs. Pomerantz Levy & Haudek. While there, I worked on a great variety of class and derivative actions, including the landmark case of *Perlman v. Feldman* (see 154 F. Supp. 436).

From the Fall of 1957 until the Spring of 1960 I was a trial attorney in the Rates Division of the Civil Aeronautics Board. My duties there consisted of representing the Government in cases establishing rates of return for the so-called local service air carriers and fixing, in each instance, the proper rate base and allowable expense items.

This was done both informally with the carriers and in formal contested hearings.

From 1960 to the present I have been in private practice on my own (first as a member of Rosenfeld & Silverman, but since 1964 as a single practitioner) specializing in derivative and class actions. I hope it doesn't sound boastful, but I have actively participated in scores of derivative and class actions; the recoveries have totaled tens of millions of dollars. While I do not wish to give a catalogue of cases, I have briefed and/or argued many well known litigations. See, for instance, *Brown v. Bullock*, 294 F. 2d 415; *Glicker v. Bradford*, 35 F. R. D. 144; *Saminsky v. Abbott*, 185 A. 2d 765; and *Feder v. Martin Marietta*, 406 F. 2d 260. Many of the earlier litigations I was involved with concerned the mutual fund industry. I have had two articles published on those cases (*The New Republic*, July 2, 1966 and January 7, 1967). I am taking the liberty of annexing a photostat of the 1966 article; it has been included in a recent book anthology. Finally, I served as a volunteer attorney for the Civil Liberties Union and reversed a contempt of court conviction based on the assertion of the Fifth Amendment. *Chandler v. U. S.*, 380 F. 2d 993.

I respectfully submit that I am qualified to represent the plaintiff and the class on whose behalf this action was brought.

Mordecai Rosenfeld

(Sworn to May 7, 1970.)

(Exhibit omitted.)

STIPULATION NUMBER 1.**UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT OF NEW YORK****[SAME TITLE]**

The undersigned, acting pursuant to their agreements made before this Court, hereby stipulate that, for the purposes of this action only and subject to all pertinent objections as to admissibility and relevance the following statements are true:

(1) During the period from May, 1962 through June, 1966, approximately 21,000,000 public individuals, institutions and intermediaries, (hereinafter collectively referred to as "shareholders") as defined herein, bought and/or sold shares of stock of the more than 6,700 corporations whose shares are publicly-held. During the period from May, 1962 through June, 1968, approximately 23,000,000 shareholders bought and/or sold shares of stock of the aforesaid corporations.

(a) The term "public individuals" means individuals who are neither members of the New York Stock Exchange (hereinafter "NYSE") nor partners nor stockholders in a member organization of the NYSE. It includes individuals transacting business through a joint account with other individuals, or as custodians for minors, but does not include individuals whose transactions are processed through an intermediary such as a bank or non-member broker/dealer.

(b) The term "institutions" includes savings banks, educational institutions, foundations, religious groups, non-profit organizations, life and other insurance companies, investment clubs, mutual funds and closed-end investment companies, non-financial corporations, partnerships, governmental bodies, personal holding companies, and non-

bank-administered estates, guardianships, pension funds, personal trusts, and profit-sharing plans having legal ownership of the shares bought and sold.

(c) The term "intermediaries" means non-members of the NYSE through whom orders for public individuals, institutions and other legal owners are placed with member firms. They include commercial banks, trust companies, and non-member broker/dealers, who place orders which are processed in an account or accounts in the name of the intermediary.

2. As of June 30, 1966, approximately 13,300,000 shareholders owned shares of stock of the more than 1,600 corporations listed on the NYSE. As of June 30, 1968 approximately 14,550,000 shareholders owned shares of stock of the aforesaid corporations listed on the NYSE.

3. Approximately 6,000,000 shareholders had odd-lot transactions during the period from May, 1962 through June, 1966 in stocks listed on the NYSE. Approximately 6,600,000 shareholders had odd-lot transactions during the period from May, 1962 through June, 1968 in stocks listed on the NYSE. The figure of 6,600,000 shareholders who had odd-lot transactions for the period May, 1962 through June, 1968 includes the aforesaid figure of 6,000,000 persons who had odd-lot transactions during the period May, 1962 through June, 1966. The number of shareholders having odd-lot transactions grew in the period June, 1966 through June, 1968 by approximately 5% a year, or a total of 600,000 persons. The same approximate rate of growth in the number of odd-lot users is believed to have continued since June, 1968. The rate of increase in the number of shareholders having odd-lot transactions is based on the rate of increase in the number of shareholders who own stock on the NYSE.

(a) During the period May, 1962 through June, 1966 the average shareholder who had odd-lot transactions in stocks listed on the NYSE had approximately 5 such transactions. The average odd-lot transaction during such period was approximately 28.2 shares at \$50.84 per share. The average odd-lot differential per transaction during such period was approximately \$5.18.

(b) During the period May, 1962 through June, 1968 the average shareholder who had odd-lot transactions in stocks listed on the NYSE (taking into account an increase in odd-lot volume which was greater than the increase in shareholders having odd-lot transactions), had approximately 7.4 such transactions. The average odd-lot transaction during such period was approximately 28.6 shares at \$51.07 per share. The average odd-lot differential during such period was approximately \$5.04.

4. The type of odd-lot transaction order (i.e., a "limit" order, a "day" order, a "market" order, an "open" order, a "stop loss" a "stop limit" order or some combination of these instructions) by the customer does not appear and is not required to appear on confirmations of purchases or sales of odd-lots of NYSE listed stocks furnished by NYSE members to their customers.

5. (a) Of the approximately 6,000,000 shareholders who had odd-lot transactions from May, 1962 through June, 1966 in stocks listed on the NYSE, the names and addresses of at least one-third, i.e., 2,000,000 can be identified as follows: Fourteen of the largest brokerage firms * (hereinafter

* These fourteen firms are Merrill Lynch, Pierce, Fenner & Smith Incorporated; Bache & Co. Incorporated; Francis I. duPont & Co.; Loeb, Rhodes & Co., Dean Witter & Co. Incorporated; Goodbody & Co.; Walston & Co., Inc.; Harris, Upham & Co. Incorporated; Shearson, Hammill & Co. Incorporated; Paine, Webber, Jackson & Curtis; Hayden, Stone Incorporated; Reynolds & Co.; E. F. Hutton & Company Inc.; Dominick & Dominick, Incorporated.

"wire firms") transmit their customers' odd-lot orders by teletype directly to either Carlisle & Jacquelin [*sic*] or De Coppet & Doremus. (The remaining firms employ the telephone or some other means of communication.) These fourteen brokerage firms account for approximately 56% of the odd-lot transactions on the NYSE. The two odd-lot firms possess computer tapes on which are recorded the transactions of each wire firm customer who has had an odd-lot transaction since May, 1962. By comparing the records and tapes of the odd-lot firms with the wire firm tapes which contain the name and address of each customer, names and addresses of odd-lot customers can be generated. Such names and addresses will be made available (if plaintiff proceeds to give notice by individual mailing to such names and addresses) by defendants at their expense in the first instance with ultimate costs to abide the event, with court process under an appropriate order or orders. Defendants cannot guarantee that the court will issue such process.

(b) Defendants Carlisle & Jacquelin and DeCoppet & Doremus, by the use of these computer tapes, can obtain the account numbers of a limited number (say from 1,000 to 5,000) of the largest of the odd-lot customers of the fourteen wire firms (who may or may not be the largest odd-lot customers) during any relevant period for which such tapes are available (as well as the number of odd-lot transactions executed for each such account number. The names and addresses represented by these account numbers can be made available to Plaintiff with court process under an appropriate order or orders. Dependents [*sic*] cannot guarantee that the court will issue such process.

(c) Of the approximately 6,000,000 shareholders who had odd-lot transactions from May, 1962 through June, 1966 in stocks listed on the NYSE, the names and addresses of

the balance, approximately two-thirds, i.e., 4,000,000, cannot be identified with reasonable effort.

6. The shareholders who had odd-lot transactions from May, 1962 through June, 1968 in stocks listed on the NYSE reside in every state in the United States as well as in most non-communist countries in the world. Approximately 6% reside in foreign countries. In some foreign countries, such as France (until 1967) and Switzerland, public individuals and institutions may not place orders with members of the NYSE but instead are required by local laws to place such orders with intermediaries, as defined in paragraph 1(c).

(a) The geographical distribution of purchasers and sellers of odd-lots in stocks listed on the NYSE is, in proportion, the same as the geographical distribution of all owners of shares of stocks of public corporations as expressed in the table marked Exhibit A.

7. In addition to the shareholders who had odd-lot transactions from May, 1962 through June, 1968 in stocks listed on the NYSE, approximately 100,000, or more, public individuals had odd-lot transactions from May, 1962 through May, 1968 in stocks listed on the NYSE through the Monthly Investment Plan. The Monthly Investment Plan allows public individuals, through member firms of the NYSE, to accumulate a stock or stocks of their choice on a pay-as-you-go basis by payment to the member firm of any amount from \$40 to \$1,000, either in monthly or quarterly installments. All Monthly Investment Plan transactions are in odd-lots. The names and addresses of all of the Monthly Investment Plan customers can be identified as follows:

The firms of Carlisle & Jacquelin and DeCoppet & Doremus operate the Monthly Investment Plan for all the

member firms except Merrill Lynch Pierce Fenner & Smith, Incorporated (hereinafter "Merrill Lynch"). The two odd-lot firms and Merrill Lynch employ computer tapes for this purpose. These tapes contain all the names and addresses of the persons who invest through the Monthly Investment Plan. Each Monthly Investment Plan investor is sent a statement on the part of the respective member of the NYSE each time he adds to his account.

8. In addition to the shareholders who had odd-lot transactions from May, 1962 through May, 1968 in stocks listed on the NYSE and the Monthly Investment Plan customers who had odd-lot transactions from May, 1962 through May, 1968 in stocks listed on the NYSE, approximately 150,000 public individuals had odd-lot transactions from May, 1962 through May, 1968 in stocks listed on the NYSE through payroll deduction plans, all of which are operated by Merrill Lynch. A payroll deduction plan allows public individuals who are employees of corporations to accumulate stock of the corporation by which they are employed on a pay-as-you-go basis by regular deduction by the corporate employer from the salary or wages of the employee. All such sums deducted by the corporate employer are then forwarded to Merrill Lynch which purchases for the employees as many shares as the commingled funds will allow. These shares are then allocated to each corporate employee in proportion to his deduction. Employees who are enrolled in payroll deduction plans share, pro-rata, all the brokerage commission and other expenses incurred in the purchase of shares. Since each corporation invests all the commingled money deducted for the purchase of shares, it is usual that the amount so invested does not buy an even number of round-lots only, but includes one odd-lot, the differential of which is shared pro-rata by the participants in the payroll deduction plan. In addition,

virtually all participants in payroll deduction plans elect to have their dividends reinvested in the stock of their corporation. All payroll deduction plan dividends are accumulated and reinvested and since again, there is likely to be one odd-lot, that odd-lot differential is allocated among those who elected dividend reinvestment. The names and addresses of all of the companies and the approximately 150,000 corporate employees who participated during the relevant period in payroll deduction plans can be identified through records of Merrill Lynch.

9. (a) During the relevant period, the NYSE employed an advertising program in the United States under which it advertised in approximately 755 newspapers. The approximate cost of the space for a single one-eight [sic] page insertion in these 755 newspapers was \$65,000.00. The NYSE paid \$193,194 for this space during the first six months of 1968 and \$382,866 during the year 1967. The approximate cost of the space for a single one-eights [sic] page insertion in every daily newspaper in the United States and Puerto Rico is \$110,000.00. The NYSE also advertised in four or more magazines during each year from 1962 through 1968. The cost of space for magazine advertising during the first six months of 1968 was \$400,000.00. The NYSE advertised in no other media.

(b) There are at least 556 daily newspapers in the United States that carry full or partial quotations of stocks listed on the NYSE.

10. Member firms of the NYSE have offices located in approximately 842 cities or towns in the United States, and in 61 cities or towns in foreign countries. Additionally, there are thousands of intermediaries as defined in paragraph 1, above, who are located in virtually every country in the non-communist world.

11. (a) All odd-lots trades on the NYSE are initiated by and executed through the facilities of member firms. In addition, confirmations on all odd-lot trades on the NYSE are sent to the public individual, institution, or intermediary, as the case may be, by the member firm.

(b) All member firms of the NYSE send periodic statements of account to their customers as required by Rule 409(a) of the NYSE which provides:

(a) Except with the permission of the Exchange, member organizations shall send to their customers statements of account showing security and money positions and entries at least quarterly to all accounts having an entry, money or security position during the preceding quarter.

(c) NYSE member firms may send other communications to their customers as they desire.

12. (a) From April 22, 1968 to October 2, 1969, 157,919 different account numbers of customers of Walston & Co., Inc. had odd-lot transactions. Of this number 60,855 had more than one such transaction.

(b) Of these account numbers of customers, 10,375 had five or more transactions during this period.

(c) A representative sample from the available tapes of the fourteen wire firms (consisting of the tapes from four of the wire firms) indicates that for the period from mid-1962 through mid-1966, 1,967 account numbers had ten or more odd-lot transactions.

(d) The names and addresses represented by the account numbers referred to in sub-paragraphs 12(b) and 12(c), as well as the names and addresses represented by the account numbers referred to in sub-paragraph 5(b), can be made available to Plaintiff with court process under

A190

Stipulation Number 1

an appropriate order or orders. Defendants cannot guarantee that the court will issue such process.

Dated: New York, New York
March 3, 1970

Mordecai Rosenfeld
Mordecai Rosenfeld
Attorney for Plaintiff

Kelley Drye Warren Clark Carr
& Ellis

By: Francis S. Bensel
A Member of the Firm
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By: Devereux Milburn
A Member of the Firm
Attorneys for Defendant
Carlisle & Jacquelin

Milbank, Tweed, Hadley &
McCloy
By: William E. Jackson
A Member of the Firm
Attorneys for Defendant New
York Stock Exchange

So ordered

U. S. D. J.

(Exhibit omitted.)

STIPULATION NUMBER 2.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

[SAME TITLE]

The undersigned, acting pursuant to their agreements made before this Court, hereby stipulate that, for the purposes of this action only and subject to all pertinent objections as to admissibility and relevance the following statements are true:

(1) *Cherner v. Transitron Electronic Corporation*, 201 F. Supp. 934 (D. Mass. 1962) involved a class action brought under the Securities Act of 1933 on behalf of Transitron stockholders who purchased stock on or before February 20, 1962. The parties agreed, with the approval of the Court, that defendants would create a \$5,300,000 fund to settle all claims. The Court appointed a Special Master, two Assistant Special Masters, (including a computer corporation engaged to process claims), a distribution agent and an agent to arrange for publication of notices.

The Special Master mailed approximately 150,000 applications (forms of proof of claim) to brokers and to stockholders of record of Transitron for completion and return. Approximately 48,000 applications (claims) covering 50,000 transactions were received by the Special Master during the 60-day filing period; of this number, approximately 13,000 were invalid, 1,177 were disapproved (143 of these after hearings), and 33,039 were approved.

During the three years required to administer the settlement the Special Master reported to the Court that the original plan of processing each claim regardless of amount, checking each item, comparing each confirmation,

etc., would require "considerable modification" by the Court in order to keep down the expenses of administration of the settlement. Speaking of the difficulties of handling the claims, the Special Master said:

"In order to examine 50,000 transactions and establish a list of valid claims which can be recommended for allowance, each application must be examined with respect to cost data and disposition data, and such data recorded on magnetic tape. Supporting data should be examined, particularly in the case of claims involving large losses. The burden of checking each transaction in the same manner in which a similar claim might be examined in a bankruptcy case involving 500 claims becomes insupportable where there are 50,000 transactions."

By order dated October 25, 1963, the Court modified the original procedure for payment of claims, and gave the Special Master wide discretion in order to minimize the cost of administration.

The expenses involved in administering the settlement fund were as follows:

(a) counsel fees and expenses of plaintiffs	\$ 275,334.18
(b) services and expenses of Special Master	53,962.05
(c) services and expenses of Assistant Special Master (attorney)	78,777.67
(d) services and expenses of Assistant Special Master (Key-data Corporation)	688,092.17
(e) services and expenses of Distribution Agent	11,915.08

(f) services and expenses of agent for publication (not including actual cost of publication)	8,624.26
	<hr/>
	\$1,116,705.41

By February 3, 1966, the date of the report of the Special Master with respect to winding up the settlement and applying for discharge, distributions had been made to holders of 33,036 claims. During the course of payment of the claims, 1,500 checks could not be delivered and were returned to the Special Master. 550 checks remained undelivered on February 3, 1966.

The cost of distributing the settlement fund among the 33,036 claimants ultimately found entitled to participate averaged \$25.47 per person, excluding attorney's fees, and \$33.80 per person, including attorney's fees.

(2) In *Illinois Bell Telephone Co. v. Slattery*, 102 F. 2d 58 (7th Cir. 1939) *cert. den.* 307 U. S. 648 (1939), the telephone company was required to make refunds of overcharges to approximately 1,400,000 Chicago area subscribers to business and residence coin box telephone service.

The company mailed 1,213,133 notices of the refund to the last known address of former subscribers. On three occasions full page advertisements, giving notice of the refund and instructions as to the manner in which subscribers could claim refunds, were placed in each of six Chicago area newspapers. The refund procedure began on October 15, 1934 and continued through at least June, 1937.

The company set up 13 new offices in Chicago to handle refunds. Subscribers made 831,328 personal visits to the 13 offices. The company received 91,287 letters and 264,391 telephone calls from subscribers relating to refunds. The various offices of the company made 1,290,078 telephone

calls to the Central Refund Bureau. At one point, over 2,000 employees were engaged exclusively in work concerning refunds.

The company checked current Chicago and suburban telephone directories to locate present addresses of former subscribers to whom company records showed refunds due and unclaimed. As a result of these checks, the company made an additional 35,122 telephone calls to locate these former subscribers and mailed 29,583 special notices to persons so located. This process resulted in claims from 14,074 subscribers who had not previously claimed.

To determine the amount of overcharges, the company recomputed approximately 45,000,000 collection tickets. In order to complete the necessary computations, each ticket was handled seventeen times.

As of May 25, 1937, 1,495,974 refunds were involved. By that date, the company had mailed 268,028 refund checks to present subscribers and 725,490 to former subscribers. Refunds for 310,389 subscribers (approximately 20% of the total) were not yet disposed of. The net amount of these checks was \$14,658,518.14, after deduction of \$1,271,299.04 in attorneys' fees and deduction of sums due to the company from its subscribers. There remained on hand \$1,845,204.29 not yet distributed, subject to additional attorneys' fees of \$138,390.32. On January 29, 1938, when the telephone company was finally discharged from liability, there remained on hand \$1,600,000 in unclaimed funds belonging to subscribers who could not be located. The company incurred expenses of over \$2,700,000 in making the refunds and accumulated 110 tons of records relating to the litigation and the refunds.

Dated: New York, New York

April 17, 1970

Mordecai Rosenfeld
Mordecai Rosenfeld
Attorney for Plaintiff

Kelley Drye Warren Clark Carr
& Ellis

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Attorneys for Defendant
Carlisle & Jacquelin

Milbank, Tweed, Hadley &
McCloy

By: William E. Jackson
A Member of the Firm
Attorneys for Defendant New
York Stock Exchange

So ordered

U. S. D. J.

**PORTIONS OF PLAINTIFF'S PROPOSED FINDINGS
OF FACT AND BRIEF IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS
PURSUANT TO RULE 23 F. R. C. P.
DATED JUNE 10, 1970.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

* * *

(26) There are some six million persons in the class. If each had to present his own personal claim for damages, the class, indeed, would not be manageable. The facts in Stipulation No. 2 only underscore the obvious. In both *Cherner v. Transitron Electronic Corporation*, 201 F. Supp. 934 (D. Mass. 1962) and *Illinois Bell Telephone Co. v. Slattery*, 102 F. 2d 58 (7th Cir., 1939). (the cases included in Stipulation No. 2), the refund process overwhelmed the refunds. And both cases involved, quite obviously, classes much smaller than the class at bar. Therefore, the pragmatic approach used in the *Bebchick* and *Market Street Railway* cases should be adopted here. Indeed, as previously noted, *Market Street Railway* was decided in the light of the experience in the *Illinois Bell Telephone Co.* case. We submit, therefore, that there is no doubt that a recovery in this case could be managed and implemented.

* * *

(30)

D. Conclusion of the Manageability Question

In conclusion: We acknowledge that the class is not manageable in the narrow sense that it would be impractic-

cable to compute and award damages to each odd-lot user in the period 1962-1966. But the wrong is no less real because it is divided into a million parts. Equity has, through the years, fashioned a way to deal with the problem of implementing a recovery on behalf of millions of beneficiaries. As outlined above, a reduction in the odd-lot differential in the future would do substantial justice. The defendants' alternative—to permit the wrongdoers to keep their illegal profits because precise justice is not possible—only rewards the wrongdoers. This solution was specifically rejected by the Supreme Court in the *Hanover Shoe* case and should be rejected here.

Defendants' zeal for unobtainable perfection is (31) also the basis of their contention that this class action should be dismissed on the ground that adequate notice cannot be given. Since the notice question is the other broad problem posed by the Second Circuit's decision, we shall discuss it next.

. . .

(38)

2. If Plaintiff's Proposals on the Manageability Question Are Accepted By the Court, the Need For Individual Notice Disappears.

Although we believe that the running of the statute of limitations makes any notice requirement for the purpose of opting out moot, we submit that plaintiff's proposed notice procedure is more than adequate even without the limitations argument. In short, if plaintiff's proposal on the manageability question (Point I, *supra*) are adopted, the significance and need of any notice is greatly diminished. Plaintiff proposes, in keeping with the opinions in the *Bebchick*, *Market Street Railway* and *Perlman v. Feldmann* cases (and the other authorities cited in Point I,

supra) that the benefits of this litigation be given to the class as it exists at the time the recovery is made. Therefore, there would be no need for a notice to the 6,000,000 members of the class who existed between 1962 and 1966. Indeed, in practicality, we recognize that it would be impossible for each member of the class to spend hours or days combining his (39) ancient files in order to recover—at best—ten or twenty dollars. Therefore, we proposed that after the amount of the damage is established, the defendants then be ordered to reduce their odd-differential until the damage is repaid. Notice, therefore, would not be sent to the 2,000,000 people whose names and addresses have now become ascertainable. Instead, notice could be given to the present class of odd-lot users by the various ways suggested above. Indeed, in that way virtually every member of the class would be notified. And the cost would be almost nothing.

• • •

**OPINION OF TYLER, J., DATED APRIL 7, 1971
PROVIDING THAT ACTION MAY BE MAIN-
TAINED AS A CLASS ACTION.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Mordecai Rosenfeld, Esq., New York City, for Plaintiff.
Carter, Ledyard & Milburn, Esqs., New York City, for
Defendant Carlisle & Jacquelin.

Kelley, Drye, Warren, Clark, Carr & Ellis, Esqs., New York
City, for Defendant DeCoppett & Doremus.

Milbank, Tweed, Hadley & McCloy, Esqs., New York City,
for Defendant New York Stock Exchange.

TYLER, District Judge:

Once again the case of *Eisen v. Carlisle & Jacquelin* has reached the point of determining whether it meets the requirements of a class action under Rule 23 of the Federal Rules of Civil Procedure. This is the latest in a series of opinions dealing with this complex issue, and it may not be the last. To recapitulate: *Eisen v. Carlisle & Jacquelin*, 41 F. R. D. 147 (S. D. N. Y. 1966) initially determined that this case could not be maintained as a class action; *Eisen v. Carlisle & Jacquelin*, 370 F. 2d 119 (2d Cir. 1966), cert. denied, 386 U. S. 1035 (1967) [hereinafter cited as *Eisen I*] held that the denial of the class action determination was appealable; *Eisen v. Carlisle & Jacquelin*, 391 F. 2d 555 (2d Cir. 1968) [hereinafter cited as *Eisen II*] reversed the initial denial of the class action and remanded to the district court for further findings necessary for the class action determination; *Eisen v. Carlisle & Jacquelin*, 50 F. R. D. 471 (S. D. N. Y. 1970) called for further information from the parties as required by the Court of Appeals opinion in

Eisen II. The nature of the case and of plaintiff's claims are adequately described in the prior opinions.

All parties have responded ably to the Court of Appeals and latest district court opinions, and it would appear that the court now has sufficient information to make all of the required findings for the class action determination.

First, the findings of fact relevant to the class action determination will be listed.¹ These findings were developed on remand and are based on submissions by the parties. Second, the conclusions required by Rule 23 will be made in light of these findings. Finally, the question of who shall pay for the cost of the Rule 23(c)(2) notice will be discussed.

FINDINGS OF FACT

1. During the period from May, 1962 through June, 1966, approximately 21,000,000 public individuals, institutions and intermediaries² (hereinafter collectively referred

1. The detailed findings of fact listed here should in no way be taken as an indication that this is a necessary procedure in every class action determination. See *Interpace Corp. v. City of Philadelphia*, 39 U. S. L. W. 2457 (3d Cir. Feb. 9, 1971). The approach has been dictated by the peculiar background and nature of this case.

2. The term "public individuals" means individuals who are neither members of the New York Stock Exchange nor partners nor stockholders in a member organization of the Exchange.

The term "institutions" includes savings banks, educational institutions, foundations, religious groups, non-profit organizations, life and other insurance companies, investment clubs, mutual funds and closed-end investment companies, non-financial corporations, partnerships, governmental bodies, personal holding companies, and non-bank-administered estates, guardianships, pension funds, personal trusts, and profit-sharing plans having legal ownership of the shares bought and sold.

The term "intermediaries" means non-members of the New York Stock Exchange through whom orders for public individuals, institutions and other legal owners are placed with member firms. They include commercial banks, trust companies and non-member broker/dealers who place orders which are processed in an account or accounts in the name of the intermediary.

to as "shareholders") bought and/or sold shares of stock of the more than 6,700 corporations whose shares are publicly held.

2. Approximately 6,000,000 shareholders had odd-lot transactions (transfers involving less than 100 shares) during the period from May, 1962 through June, 1966 in stocks listed on the New York Stock Exchange (hereinafter "NYSE"). Approximately 6,600,000 shareholders had odd-lot transactions during the period from May, 1962 through June, 1968 in stocks listed on the NYSE. The number of shareholders having odd-lot transactions grew in the period June, 1966 through June, 1968 by approximately 5 percent a year, or a total of 600,000 persons.

3. During the period May, 1962 through June, 1966, the "average shareholder"³ who had odd-lot transactions in stocks listed on the NYSE had approximately 5 such transactions. The average odd-lot transaction during such period was approximately 28.2 shares at \$50.84 per share. The average odd-lot differential per transaction during such period was approximately \$5.18.

4. During the period May, 1962 through June, 1968, the average shareholder who had odd-lot transactions in stocks listed on the NYSE (taking into account an increase in odd-lot volume which was greater than the increase in shareholders having odd-lot transactions), had approximately 7.4 such transactions. The average odd-lot transaction during such period was approximately 28.6 shares at \$51.07 per share. The average odd-lot differential during such period was approximately \$5.04.

5. Of the approximately 6,000,000 shareholders who had odd-lot transactions from May, 1962 through June, 1966 in stocks listed on the NYSE, the names and addresses

3. I.e., the typical buyer or seller of odd-lots.

of at least one-third, i.e. 2,000,000, can be identified as follows: fourteen of the largest brokerage firms⁴ (hereinafter "wire firms") transmit their customers' odd-lot orders by teletype directly to either Carlisle & Jacquelin or DeCoppet & Doremus. (The remaining firms employ the telephone or some other means of communication.) These fourteen brokerage firms account for approximately 56 percent of the odd-lot transactions on the NYSE. The two odd-lot firms possess computer tapes on which are recorded the transactions of each wire firm customer who has had an odd-lot transaction since May, 1962. By comparing the records and tapes of the odd-lot firms with the wire firm tapes which contain the name and address of each customer, names and addresses of odd-lot customers can be generated.

6. Defendants Carlisle & Jacquelin and DeCoppet & Doremus, by the use of these computer tapes, can obtain the account numbers of a limited number of the largest of the odd-lot customers of the fourteen wire firms (who may or may not be the largest odd-lot customers) during any relevant period for which such tapes are available, as well as the number of odd-lot transactions executed for each such account number.

7. Of the approximately 6,000,000 shareholders who had odd-lot transactions from May, 1962 through June, 1966 in stocks listed on the NYSE, the names and addresses of the balance, approximately two-thirds, i.e., 4,000,000, cannot be identified with reasonable effort.

4. These fourteen firms are: Merrill Lynch, Pierce, Fenner & Smith, Inc.; Bache & Co. Inc.; Francis I. duPont Co. Inc.; Loeb, Rhodes & Co.; Dean Witter & Co. Inc.; Goodbody & Co.; Walston & Co., Inc.; Harris, Upham & Co. Inc.; Shearson, Hammill & Co. Inc.; Paine, Webber, Jackson & Curtis; Hayden, Stone, Inc.; Reynolds & Co.; E. F. Hutton & Company Inc.; and Dominick & Dominick, Inc.

8. The shareholders who had odd-lot transactions from May, 1962 through June, 1968 in stocks listed on the NYSE reside in every state in the United States as well as in most non-communist countries in the world. Approximately 6 percent reside in foreign countries. The geographical distribution of purchasers and sellers of odd-lots in stocks listed on the NYSE is, in proportion, the same as the geographical distribution of all owners of shares of stocks of public corporations as expressed in the table attached as Appendix A. From 1962 to 1965, New York and California had by far the largest numbers of such shareowners.

9. In addition to the shareholders who had odd-lot transactions from May, 1962 through June, 1968 in stocks listed on the NYSE, approximately 100,000 or more public individuals had odd-lot transactions during the same period in stocks listed on the NYSE through the "Monthly Investment Plan."⁵ Such individuals can be identified through computer tapes in a way similar to that discussed above for approximately 2,000,000 shareholders.

10. In addition to the shareholders who had odd-lot transactions from May, 1962 through May, 1968 in stocks listed on the NYSE and the Monthly Investment Plan customers described above, approximately 150,000 public individuals had odd-lot transactions during the same period in stocks listed on the NYSE through "payroll deduction plans",⁶ all of which are operated by Merrill, Lynch, Pierce,

5. The "Monthly Investment Plan" allows public individuals, through member firms of the NYSE, to accumulate a stock or stocks of their choice on a pay-as-you-go basis by payment to the member firm of any amount from \$40 to \$1,000, either in monthly or quarterly installments. All Monthly Investment Plan transactions are in odd-lots.

6. A "payroll deduction plan" allows public individuals who are employees of corporations to accumulate stock of the corporation by which they are employed on a pay-as-you-go basis by regular deduc-

Fenner & Smith, Inc. The names and addresses of such individuals can be identified through the records of Merrill, Lynch.

11. During the relevant period, the NYSE employed an advertising program in the United States under which it advertised in approximately 755 newspapers. The approximate cost of the space for a single one-eighth page insertion in these 755 newspapers was \$65,000. The approximate cost of the space for a single one-eighth page insertion in every daily newspaper in the United States and Puerto Rico is \$110,000. The NYSE also advertised in four or more magazines during each year from 1962 through 1968. The cost of space for magazine advertising during the first six months of 1968 was \$400,000. The NYSE advertised in no other media.

12. There are at least 556 daily newspapers in the United States that carry full or partial quotations of stocks listed on the NYSE.

13. Member firms of the NYSE have offices located in approximately 842 cities or towns in the United States, and in 61 cities or towns in foreign countries. Additionally there are thousands of intermediaries who are located in virtually every country in the non-communist world.

14. Rule 409 of the NYSE provides in part as follows:

- (a) Except with the permission of the Exchange, member organizations shall send to their customers statements of account showing security and money

6. (Cont'd.)

tion by the corporate employer from the salary or wages of the employee. Employees who are enrolled in payroll deduction plans share, pro-rata, all the brokerage commissions and other expenses incurred in the purchase of shares. Normally, a payroll deduction for such purchases requires odd-lot rather than round-lot transactions.

positions and entries at least quarterly to all accounts having an entry, money or security position during the preceding quarter. . . .

- (d) Customers' confirmations shall bear a notation or legend which will enable the customer to determine the amount of any odd-lot differential.

15. A representative sample from the available tapes of the fourteen wire firms (consisting of the tapes from four of the wire firms) indicates that for the period from mid-1962 through mid-1966, 1,967 account numbers had ten or more odd-lot transactions.

16. *Cherner v. Transitron Electronic Corporation*, 201 F. Supp. 934 (D. Mass. 1962) involved a class action brought under the Securities Act of 1933 on behalf of Transitron stockholders who purchased stock on or before February 20, 1962. The parties agreed, with the approval of the court, that defendants would create a \$5,300,000 fund to settle all claims. The court appointed a Special Master, two Assistant Special Masters (including a computer corporation engaged to process claims), distribution agent and an agent to arrange for publication of notice.

The Special Master mailed approximately 150,000 applications (forms for proof of claim) to brokers and to stockholders of record of Transitron for completion and return. Approximately 48,000 claims covering 50,000 transactions were received by the Special Master during the 60-day filing period; of this number, approximately 13,000 were invalid, 1,177 were disapproved (143 of these after hearing) and 33,039 were approved.

The approximate expenses involved in administering the settlement fund were as follows: (a) counsel fees and expenses—\$275,000; (b) Special Master—\$54,000; (c) Assistant Special Master (attorney)—\$79,000; (d) Assistant

Special Master (computer corporation)—\$688,000; (e) Distribution Agent—\$12,000; (f) services related to publication (not including actual publication costs)—\$9,000. The total expense was approximately \$1,117,000.

The cost of distributing the settlement fund among the 33,036 claimants ultimately found entitled to participate averaged \$25.47 per person excluding attorney's fees and \$33.80 per person including attorney's fees.

17. The class action aspect of *State of West Virginia v. Chas. Pfizer & Co., et al.*, 68 Civ. 240 (S. D. N. Y.) (hereinafter cited as the "*Drug Cases*") involved a recovery on behalf of all consumers who purchased broad spectrum antibiotic products from 1954 to 1966. It is estimated that the class includes approximately 150 million persons located in every state of the Union and Puerto Rico. Defendants in the *Drug Cases* agreed to settle all cases for a total of \$100,000,000; \$37,000,000 of that was allocated to the class of individual consumers. Defendants also agreed to advance the expenses of maintaining and settling the class action, with the amounts so advanced to be deducted from the settlement fund if and when the settlement was ultimately approved.

18. The total expense of maintaining and settling the *Drug Cases* consumer class action will be approximately \$285,000. These expenses can be divided into the following three categories:

(a) *Rule 23(c)(2) Notice*—A notice informing class members of their right to file claims or opt-out of the class was published in every English and Spanish language newspaper of general circulation published in the United States. The total cost was approximately \$130,000. In response to this notice 42 individual consumers served notices opting out. During the months immediately sub-

sequent to publication of this notice, plaintiffs' attorneys received several hundred telephone calls from individual consumers and attorneys throughout the country seeking technical legal information with regard to the notice, including the nature of the claims asserted in the complaints, the right of a consumer to opt out, the liability of a consumer for costs and expenses if he did not opt out and other related expenses.

(b) *Rule 23(e) Notice*—A notice of hearing on the proposed settlement was published in the two newspapers of largest circulation in each state. The total cost of this publication was around \$30,000. In addition, the Rule 23(e) notice was sent to each individual consumer who had filed a claim. Approximate expenses for this notice were: \$6,300 for the preparation of the consumer class mailing list and \$7,100 for duplicating and mailing the notice. In addition, about \$8,500 of general expenses (cost of post office boxes and the expense of an escrow agreement) have been allocated to the consumer class. The total expense to the consumer class was, therefore, \$53,000, in round numbers.

(c) *Processing of Claims*—As of August, 1970, plaintiffs' attorneys had received \$65,000 for processing consumer claims; the best estimate for the total expense for this item is \$100,000. Approximately 42,000 individual claims, representing total drug purchases of approximately \$17,000,000, have been filed. All claims have been processed by plaintiffs' attorneys using their own filing system, refund forms and forms for responding to claimants. No special master has yet been appointed or found necessary. Approximately one-half of the 42,000 claims received did not contain sufficient information to be accepted and required follow-up correspondence seeking clarification.

Approximately 80 percent of the claims filed contained only approximate cost information for various reasons, viz.: claimant had no records of drugs purchased; druggist refused to supply the information; drug store had ceased doing business; doctor could not or would not supply the information. To check validity of claims, plaintiffs' attorneys are reviewing each claim where total purchases exceed \$1,000 and spot checking all others. Three categories have been established after review: claims approved in full, claims approved in part and disapproved claims. Plaintiffs' attorneys are recommending to the court that all approved claims be paid a fixed percentage of their total drug purchases.

19. Costs of publication of various size notices in newspapers of several large cities are set forth in Appendix B.

20. The printing cost for 2,000,000 copies of plaintiff's proposed notice would be approximately \$9,350. The printing cost for 2,000,000 verified claim forms as proposed by defendants would be approximately \$9,400.

21. The cost for stuffing a single page printed notice and mailing it with first class domestic postage would be 10 cents per letter, including the postage, irrespective of the number of letters to be sent.

RULE 23 CONCLUSIONS

I. Prior Determinations

The Court of Appeals heretofore has determined that certain requirements on the face of Rule 23 are satisfied in this action. To summarize, under Rule 23(a): (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; and (3) the claims of plaintiff are typical of

the claims of the class. *Eisen II* at 561-62. Rule 23(b)(1) and (2) are not applicable to this action. *Eisen II* at 564. Under Rule 23(b)(3), the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, *Eisen II* at 566, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *Eisen I* at 121.

II. Questions to be Considered on Remand

A. Adequacy of Representation

The first question left open by the Court of Appeals for consideration by this court was whether the plaintiff, as representative party, will fairly and adequately protect the interests of the class. F. R. Civ. P. Rule 23(a)(4). For making this decision, the Court of Appeals set out certain guidelines. First, this court is to determine whether the attorney for plaintiff is "qualified, experienced and generally able to conduct the proposed litigation." *Eisen II* at 562. Second, the court must be satisfied that there is little likelihood of a collusive suit or of plaintiff's having interests antagonistic to those of the remainder of the class. *Id.* Third, and generally, the court must be satisfied that plaintiff is interested enough to be a forceful advocate and that a substantial number of class members would accept him as their representative if they were given a choice. *Id.* at 563 n. 7; Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 Buff. L. Rev. 433, 460 (1960).

I have no hesitation in ruling that plaintiff and his attorney meet all of these requirements. It has already been determined that plaintiff's claim is typical of the claims of the class, and from the nature and quality of the

litigation conducted to date, there is little doubt that plaintiff's attorney is a qualified, forceful advocate who will adequately protect the interests of the entire class. The issues raised thus far have all been hotly disputed, to say the least, and I find no evidence before me that this is a collusive suit. Defendants have suggested that since plaintiff has proposed a "fluid class recovery" as a means of distributing some if not all of the damages to the class, somehow this indicates that he has interests which are antagonistic to the remainder of the class. But, for reasons which are discussed more fully below in connection with the issue of manageability, I reject this argument and find that plaintiff's proposal is a flexible and practical means of satisfying the interests of the entire class.

B. Manageability

The second and by far the most difficult question to be considered by this court is what has generally been called the issue of manageability. It derives from one of the factors to be considered under Rule 23(b)(3) in determining whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Pursuant to subparagraph (D), the court must examine "the difficulties likely to be encountered in the management of a class action". Although this is merely one factor among many on the face of the Rule, in a case of the size and nature of this one, the issue of manageability assumes major proportions.

Before discussing specific details of the management of this class action, a definitive ruling should be made as to the exact composition of the class. Based on the allegations in the complaint and on the findings set forth above, the class in this case is composed of all public individuals, institutions and intermediaries who bought and/or sold

odd-lots of shares of stock on the NYSE during the period from May 1, 1962 through June 30, 1966. Such definition is, of course, subject to modification at a later time. Rule 23(d) F. R. Civ. P.

1. *Computation of Damages.* One of the primary concerns of this court in its most recent opinion was whether, if liability were established, a specific amount of damages in fact could be determined without having each member of the class file an individual claim. In approaching this question, it is recognized that an exact computation is not required; it is sufficient, of course, if there is relevant data from which the jury can make a just and reasonable estimate of the damages. *Bigelow v. RKO Radio Pictures*, 327 U. S. 251, 264 (1946); see also *Union Carbide and Carbon Corporation v. Nisley*, 300 F. 2d 561, 590 (10th Cir. 1962), appeal dismissed, 371 U. S. 801 (1962). If a wrong has been done, courts generally can find a way of placing a value, albeit a rough one, on the amount of damages suffered.

In this case, I am satisfied that gross damages may be fairly estimated without having individual claims filed by each class member. The sources for such a computation will include at least the following: defendants' own records, the REPORT OF SPECIAL STUDY OF SECURITIES MARKETS OF THE SECURITIES AND EXCHANGE COMMISSION, H. R. Doc. No. 95, Part 2, 88th Cong., 1st Sess. (1963) [hereinafter cited as SEC Special Study], records of the NYSE Special Committee on Odd Lots relating to the lowering of the odd-lot differential in 1966 and a cost study of the odd-lot industry conducted for the NYSE by Price Waterhouse & Co. See *Daar v. Yellow Cab Company*, 67 Cal. 2d 695, 63 Cal. Rptr. 724, 433 P. 2d 732 (1967); *contra*, *Hawaii v. Standard Oil Company of California*, Civ. No. 2826 (D. Hawaii, filed May 27, 1969).

Defendants consistently have stressed the number of variations in the types of odd-lot transactions, implying that this would necessitate a separate calculation of damage for each individual transaction. Although originally influenced by this argument, see *Eisen v. Carlisle & Jacquelin*, 41 F. R. D. 147, 150 (S. D. N. Y. 1966), in light of the availability of such information and records discussed above, I now reject it. As the Court of Appeals has pointed out, moreover, defendants make the same charge to all buyers and sellers no matter what the type of transaction. *Eisen II* at 562.

2. *Mechanics of Administration.* Under this heading the Court of Appeals directed that certain specific questions be considered to insure that insuperable obstacles do not present themselves at a later time after much time and money are expended by both the parties and the court. In the discussion of these questions, it will be noted that most of the estimates involved are based primarily on the experience of this court in administering the settlement of the consumer class action phase of the *Drug Cases*. Defendants have argued, and at least two courts have indicated, that the experience in the *Drug Cases* is not a valid reference for cases where there is no settlement and all issues are disputed to the bitter end. See *Hackett v. General Host Corporation*, Civ. No. 70-364 (E. D. Pa., filed July 30, 1970); Record of May 19, 1970, at 41-42, *Union Health Center of New York v. Chas. Pfizer & Co. Inc.*, Civ. No. 69-2838 (S. D. N. Y.). There is something to be said for this position; thus, where obvious distinctions between this case and the *Drug Cases* have required, I have adjusted estimated expenses accordingly. On the other hand, it is obvious that the major burden and cost of administering this class action will occur, if at all, at the point where liability has been determined and damages awarded. If this case

should ever reach that posture, the remaining task would be distribution of a specific fund and in this sense not very different from the settlement posture and procedures of the *Drug Cases*.

As to the specific areas of determination suggested by the Court of Appeals, first, I find that a special master hopefully and probably will not be necessary in this case. Although a special master and two assistants were appointed in the *Cherner* case at substantial cost, see Finding Number 16, I note that this procedure was successfully avoided in the *Drug Cases* where the burdens have been assumed by plaintiffs' counsel. Although it is true that plaintiff's counsel here is a single practitioner, he may receive assistance from counsel for other class members, and if not, arrangements for administrative assistance should not be too difficult or costly—and less costly, it is to be assumed, than the fees and expenses of a master.

Second, an estimate of the sums required for paperwork, printing, postage and publication is required. These sums can be divided into three categories: (a) Rule 23(c)(2) Notice, (b) Rule 23(d) Notice if liability and damages are determined and (c) processing of claims and inquiries.

- (a) As discussed more fully below, the cost of notice required by due process and Rule 23(c)(2) in this case can be computed at approximately \$21,720.
- (b) If liability and damage should be determined, more extensive notice to invite filing of claims under Rule 23(d) might be possible since the expense of such notice could be deducted from the total amount of damages. Thus, estimates for mailing individual notices to the 2,000,000 identifiable class members here, see Finding Number 5, would be \$9,350 for printing notices, \$9,400 for

printing proof of claim forms and \$200,000 for stuffing and mailing. In addition, relying on the *Drug Cases*, published notice might be required in the two newspapers of largest circulation in each state at a cost of approximately \$30,000. Publication in several major foreign newspapers can be estimated at \$23,000. See Finding Number 19 and Appendix B.

- (c) Processing of the 42,000 individual claims filed in the *Drug Cases* is expected to reach a total cost of approximately \$100,000. See Finding Number 18. However, since this figure may not reflect the cost of processing of inquiries after the Rule 23(c)(2) notice and because there is great likelihood that there may be a larger number of claims filed in the instant case, an estimate for processing of claims and inquiries should be double the *Drug Cases* figure, or approximately \$200,000.

Thus, combining all three categories, at this point in the litigation the best estimate of the total sums required for paperwork, printing, postage and publication is \$500,000 in round numbers.

The third mechanical question generally concerns procedures for possible intervention of other class members. See *Eisen II* at 567. As the class action device has come to be used more frequently, the experience in this court has indicated that intervention can be accomplished by very simple procedures. For example, class members so inclined might contact plaintiff's counsel and make an appropriate motion setting forth concise facts indicating that the would-be intervenors qualify as class members.⁷

7. Also, the appellate court suggested, *Eisen II* at 567, that consideration be given to possible problems of jurisdiction and venue. Upon remand, counsel have not suggested nor do there appear to

The fourth mechanical question concerns possible problems class members might have in filing and proving their claims. Filing, of course, can be routinely accomplished by filling out and mailing in a proof of claim form to be supplied by the court through plaintiff's counsel. Defendants have already proposed a form which appears acceptable, with some possible minor modifications. Claims can be proved either by verification or certification by the claimant's broker-dealer. An analogous method has proved satisfactory in the *Drug Cases*. See also *Union Carbide and Carbon Corporation v. Nisley*, *supra* at 587-88. Defendants have submitted affidavits of brokers stating that, because of routine destruction of records or practical impossibility, they would be unable to furnish customers with records of their odd-lot transactions in the relevant period. Accepting these affidavits as true, they do not establish that all such records are unavailable through broker-dealers; moreover, it cannot be assumed from these available affidavits that customers are without records of their own. Lost or missing records are normal hazards of litigation in general; this circumstance cannot be fairly raised as a bar to class litigation.

3. *Distribution of Recovery.* The Court of Appeals has made clear that one of the most important considerations in a case of this type is the likelihood that class members will share in any eventual judgment. In weighing the class action question, the trial court must balance the desirability of providing a forum for bona fide small claims against the impropriety of permitting suits which only benefit lawyers. *Eisen II* at 567. Crucial also is the ability of the court to

7. (Cont'd.)

exist significant jurisdictional problems, save perhaps those related to the substance of plaintiff's claims discussed hereinafter. Since defendants are located within this district, as is the bulk of relevant documentary evidence, venue seems proper here. Finally, no significance in relation to the class action determination issue attaches to the fact that plaintiff has already demanded a jury trial.

fashion a remedy, relying on its own and counsel's ingenuity, where a wrong has been done and where the consequences of not fashioning a remedy would permit avoidance of appropriate sanctions and the retention of illegal profits. See *In re Multidistrict Private Civil Treble Damage Antitrust Litigation Involving Motor Vehicle Air Pollution Control Equipment*, 14 F. R. Serv. 2d 420 (C. D. Cal. 1970); *Daar v. Yellow Cab Company*, *supra*. Cf. *Bigelow v. RKO Radio Pictures*, *supra* at 264.65.

Distribution of an eventual recovery to the class members in a case such as this one need not be viewed solely in terms of personal and individual damages and recoupment thereof. Such a view is appropriate where the disputed transactions themselves are personal and individual and have litigable significance to the plaintiff. The situation here, however, is different. Although the total volume of transactions is very large, each transaction, as far as the issues here are concerned, is thoroughly stereotyped and is sufficiently small so that the benefits of individual recovery are not worth the price of litigating individual claims. These transactions are also frequently repeated by many individuals who may be expected to repeat. See Finding Number 2.

With these indicia present, I think it appropriate, as plaintiff urges, to consider some kind of "fluid class recovery", i.e. to consider distribution of damages to the class as a whole rather than to adopt, at this initial, planning stage, an inflexible mold of recovery running to specific class members. To emphasize individual recovery is to unduly stress considerations not totally relevant to the conditions of this case, especially the small amounts of potential recoveries by most class members, which, absent the class device, would effectively bar suit by the majority of odd-lot investors. Perhaps fortuitously, the repetitive activity of the principals in odd-lot transactions makes it

possible to fashion a procedure which will assure that the benefits of any recovery will flow in the main to those who bore the burden of defendants' allegedly illegal acts. Indeed, there is respectable precedent for such a "fluid class recovery". See *Bebchick v. Public Utilities Commission*, 318 F. 2d 187 (D. C. Cir. 1963), cert. denied, 373 U. S. 913 (1963); the *Drug Cases*, *supra*; *Daar v. Yellow Cab Company*, *supra*. This does not mean, of course, that individual recovery is to be entirely ruled out. Individual claims may be satisfied to the extent they are filed, but the fluid class recovery might then be appropriate for distribution of the unclaimed remainder.

It is not now necessary to determine the exact nature of fluid class recovery which might be used in this case. That is a matter for the court and the parties if and when liability is determined and damages assessed. It is necessary to recognize at this point, however, that a method of recovery of damages not claimed by individual class members can be fashioned to substantially benefit the entire class. In this regard, plaintiff has suggested that a fund equivalent to the amount of unclaimed damages might be established and the odd-lot differential reduced in an amount determined reasonable by the court until such time as the fund is depleted. See *Bebchick v. Public Utilities Commission*, *supra*; *Daar v. Yellow Cab Company*, *supra*. In this manner, the class members, assuming they have maintained their odd-lot activity, will reap the benefits of any recovery. Without intending to rule now on the nature of any possible recovery in this case, suffice it to say that plaintiff's suggestion has sufficient merit to at least satisfy the court that some method of distribution will be possible if required.

Defendants have argued that plaintiff, by advancing this proposal, has effectively abandoned the original class

and thereby established his inadequacies as champion of that class. I am constrained to disagree, however, since the proposal is specifically designed to provide the best practicable method of benefiting the original class—i.e. to insure that the litigation, if successful for the class, does not founder upon shoals of excessive costs and detail in awarding and computing damages on an individual basis. In addition, defendants have suggested that plaintiff's proposal would constitute "judicial rate-fixing", thereby infringing upon the exclusive jurisdiction of the Securities and Exchange Commission ("SEC"). This argument may have merit, but defendants press it too far—i.e. such a reduction in the differential, if carried out, might properly be done under SEC supervision or at least with SEC approval.

Having thus considered possible methods for distribution of a recovery, there remains only for consideration the "mathematical prospects" of the case in order to ascertain at least the theoretical availability of a fund from which to distribute damages. This simply means and requires a rough estimation of potential damages, deducting therefrom the estimated costs of administration to determine a net potential fund available for actual distribution. The costs of administration were estimated heretofore at \$500,000. Estimating gross potential damages is necessarily more difficult, but a rough maximum and minimum might be arrived at as follows: (1) maximum—defendants' reduction of the odd-lot differential in 1966 amounted to approximately \$5,000,000 per year—multiplied by the four years here in question and trebled, damages might be \$60,000,000; (2) minimum—assuming a five percent illegal portion of the odd-lot differential during the relevant period⁸ and apply-

8. Plaintiff has estimated that he paid \$259 in odd-lot differentials from 1960-1966 and that his damages were about \$70. Thus, his claim is that approximately 27 percent of the charge was illegal. For purposes of establishing a minimum on potential damages, I have arbitrarily chosen 5 percent.

ing it to the average number of transactions and the average differential during the relevant period, multiplied by 6,000,000 and trebled, damages might be approximately \$22,000,000. Thus, it becomes apparent that if plaintiff succeeds on behalf of the class, there will be a substantial recovery to be distributed.

C. Notice

Determination of the kind of notice and how to disseminate it, as this case illustrates, can be a difficult task for the district court. Notice must be governed not only by basic due process standards but also by the standards of Rule 23 (c)(2) itself. Thus, an examination of these requirements will be necessary before determining the kind of notice appropriate in this case.

As stated in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 36 (1950), the fundamental requirement of due process in any final proceeding is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314. The test is a flexible one and must be applied on a case-by-case basis: "[I]f with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied." *Id.* at 314-15. Frequently a balancing of interests is required. *Id.* at 313-14. In addition, emphasis is to be placed upon the procedure adopted as a whole to insure that it results in full and fair consideration of all claims and adequately protects the interests of those persons not present but bound by the judgment. *Hansberry v. Lee*, 311 U. S. 32 (1940). See also *Mullane v. Central Hanover Bank & Trust Co.*, *supra* at 319; *Dolgow v. Anderson*, 43 F. R. D. 472, 500 (E. D. N. Y. 1968); *Northern Natural Gas Co. v. Grounds*,

292 F. Supp. 619, 636 (D. Kans. 1968); *State of Iowa v. Union Asphalt & Roadoils, Inc.*, 281 F. Supp. 391 (S. D. Iowa 1968), *aff'd.*, 408 F. 2d 1171 (1969).

Rule 23(c)(2) does not add to these requirements; it simply formulates guidelines for a particular kind of notice in a particular kind of action. See *Eisen II* at 568; Advisory Committee's Note, Proposed Rules of Civil Procedure, 39 F. R. D. 98, 107 (1965) [hereinafter cited as Advisory Committee's Note]. The district court must direct to the members of the class "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." F. R. Civ. P. Rule 23(c)(2). As is clear from the face of the Rule, the notice should be designed to inform class members of the possibility of their excluding themselves from the action, the possibility of their appearing and participating in the action and the fact that they will be bound by any judgment if they do not exclude themselves. In light of these purposes, it naturally follows that as the size of potential recovery available to each class member diminishes, any incentive class members may have to respond to the notice also diminishes. See *Berland v. Mack*, 48 F. R. D. 121, 129 (S. D. N. Y. 1969). Consequently, where a class consists of a large number of claimants with relatively small individual claims, notice to individual class members, as a legal and practical matter, becomes less important and need not be unduly emphasized or required.

Although not so stated in the Rule, the notice effectively serves to protect defendants in two ways. First, by including in the judgment all members who do not affirmatively opt out, defendants can obtain significant *res judicata* benefits. Second, a large number of class members may opt out, not wishing to press their claims even though they may be legitimate. In the context of this case, it is sig-

nificant that the applicable statute of limitations has run, 15 U. S. C. § 15b (1964); hence *res judicata* consequences presumably matter little to defendants. But see *Philadelphia Electric Company v. Anaconda American Brass Company*, 43 F. R. D. 452, 461 (E. D. Pa. 1968).

Finally, in determining what kind of notice is required by due process and Rule 23(c)(2), it must be recalled that expensive and stringent notice requirements could vitiate the class action device in situations where application thereof as a matter of public policy can be important, such as private antitrust, consumer and environmental litigation. See *Herbst v. Able*, 47 F. R. D. 11, 21 (S. D. N. Y. 1969); *Dolgow v. Anderson*, *supra* at 497. Cf. *Booth v. General Dynamics Corporation*, 264 F. Supp. 465 (D. Ill. 1967). Hence, the district court must strive to fashion notice which fairly and adequately protects all interests in the action without imposing what in effect amounts to an insuperable tariff on prosecution of the case.

1. *Form of Notice.* Applying these general principles to the case at hand, the Court of Appeals has indicated that there should be some "evidentiary basis for the findings necessary to support rulings of what would or would not amount to compliance with the requirements of due process and with the provisions of 23(c)(2)." *Eisen II* at 569. I believe that the findings of fact enumerated above should satisfy this requirement, and they are to be deemed incorporated in this discussion.

First, plaintiff has offered to send individual notice to all member firms of the NYSE and to all commercial banks with large trust departments, the assumption being that many class members may thus receive indirect but nevertheless effective notice. Although, by itself, this would be far from satisfactory, in combination with the other forms

of notice discussed below, this proposal does increase the likelihood of reaching a significant portion of the class. The same is true for any news coverage which might be generated during the course of this suit. See *Snyder v. Board of Trustees of University of Illinois*, 286 F. Supp. 927 (N. D. Ill. 1968); *Johnson v. Robinson*, 296 F. Supp. 1165 (N. D. Ill. 1967), aff'd, 394 U. S. 847 (1969).

Second, some form of mailed notice must be sent to individual class members who are reasonably identifiable. Defendants have taken the position that any mailed notice must go to all of the approximately 2,000,000 class members who are identifiable. See Finding Number 5. Although the argument has some merit, I conclude that such notice is not compelled by the standards of due process and Rule 23(c)(2) in the context of this case. First, the flexibility of the rule is clear on its face, speaking in terms of the "best notice practicable under the circumstances" and of class members who are identifiable "through reasonable effort."⁹ In addition, even due process requirements have been phrased in terms of identifying persons whose names and addresses are "very easily ascertainable." *Schroeder v. City of New York*, 371 U. S. 208, 212-13 (1962).

Individual notice in this case shall be mailed to the approximately 2,000 or more class members who had ten or more transactions during the relevant period. See Find-

9. See also Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 396 (1967):

In particular cases it may be practicable to give notice under (c)(2) which will reach each member of the class. That will not be possible in all cases, but when large numbers of people are dealt with, perfect notice, while on the one hand hard to attain, becomes on the other hand unnecessary because of the probability that some individuals who are representative of differing opinions within the group (if such differences exist) will in fact be reached and will speak up.

ing Number 15.¹⁰ This accords with the Court of Appeals' suggestion of trying to identify those class members who may have "enough of a stake in the proceedings to justify personal intervention." *Eisen II* at 569. In order to insure adequate representation and to gain more information about the nature of the class, individual notice shall also be mailed to 5,000 other class members selected at random from the 2,000,000 persons and firms who are identifiable.¹¹ The total cost would be approximately \$1,000 for printing, stuffing and mailing.

Third, and finally, notice by publication shall be required as a feasible attempt to reach the remainder of the class. Such notice shall be one-quarter page in size and shall take place once each month for two consecutive months in the following publications: (1) national edition of the *Wall Street Journal* (approximately \$5,000); (2) financial section of the *New York Times* (approximately \$2,100); (3) financial sections of the *San Francisco Chronicle* and *San Francisco Examiner* (approximately \$1,700); and (4) financial section of the *Los Angeles Times* (approximately \$1,560). Obviously, these are somewhat arbitrary determinations intended to provide the most suitable notice under the circumstances, but there are significant reasons for choosing these publications. The *Wall Street Journal* has long served the overall community of investors, and the national edition should reach a large and disparate number of class members. Also, as of 1965, New York and California had by far the largest number of shareowners of public

10. The figure in Finding Number 15 is based on a representative sample of the tapes of four of the fourteen wire firms which have such tapes. I assume that a survey of the remaining tapes will turn up more than the approximately 2,000 identified so far.

11. There is an additional reason for requiring this random notice—it is theoretically possible that the large claimants might form a special subclass either friendly toward defendants or not entirely representative of the small claimants.

corporations in comparison to all other states; there is no reason to suppose their position has slipped in the intervening six years. See Finding Number 8 and Appendix A. Selection of the particular cities and newspapers is designed to reach the largest number of class members in those areas.

In the circumstances of this case, I reason that such notice devices together will fairly accommodate the interests of both the class and the defendants. Assuming that a significant number of class members should exclude themselves, this might be viewed as an indication that the interests of the class are not being adequately represented. In such event, to properly consider the question of whether defendants should be shielded from the expense and effort of defending a suit which a large number of class members may not favor, further individual notice might then be required. On the other hand, a lack of response to the notice would not shed any light on adequacy of representation and would probably mean that the notice was sufficient for this case. See *Eisen II* at 563.

2. *Contents of Notice.* Although it is not necessary to decide now the final content of the notice, plaintiff has made a proposal, attached as Appendix C, which is succinct and, with minor modifications, should be satisfactory. That proposal specifically includes a brief description of the proposed fluid class recovery, thus giving each class member an opportunity to express himself on this aspect of the suit. In order to gain more information about the nature of the class, the mailed notice to individual class members will also include a request for the following information: the number of odd-lot transactions during the 1962-1966 period, specifying for each the number and price of shares bought or sold, the name of the stock, the name of the brokerage firm and the amount of the odd-lot differential charge if known. Such a request will be for voluntary responses only and will

not be treated as a requirement for inclusion as a member of the class. But see *State of Iowa v. Union Asphalt & Roadoils, Inc.*, *supra* at 403-05; *Philadelphia Electric Company v. Anaconda American Brass Company*, *supra* at 462. Not only would such a mandatory procedure be contrary to the language of Rule 23(c)(2), but also it would be unnecessary in this case in light of the contemplated method of computing damages and the proposed fluid class recovery heretofore discussed.

3. *Administration of Notice.* Plaintiff shall be responsible for making all arrangements for printing, mailing and publication, except that defendants shall supply him with all necessary names and addresses of individual class members. The individual notice will be sent on court stationery from the Clerk of the Court with a special post office box designated for all responses. Inquiries and responses will be managed by the plaintiff under court supervision.

III. Cost of Notice

The question of who shall pay for the Rule 23(c)(2) notice is the only serious obstacle remaining which might prevent the maintenance of this suit as a class action.¹² Plaintiff has asserted from the outset that he cannot pay for the forms and methods of notice ruled necessary in this case, and if I were to follow literally the earlier indication of the Court of Appeals that the plaintiff must always pay for the expense of notice in the first instance, *Eisen II* at 568, this litigation would come to an abrupt termination.

Thus, the doubts and difficulties of this class action become finally focused on this one issue. If the expense of

12. The cost of any subsequent notice, for example under Rule 23(d) regarding the filing of claims, should not present the same problem since the issue of liability will have already been determined.

notice is placed upon plaintiff, it would be the end of a possibly meritorious suit, frustrating both the policy behind private antitrust actions and the admonition that the new Rule 23 is to be given a liberal rather than a restrictive interpretation, *Eisen II* at 563. On the other hand, if costs were arbitrarily placed upon defendants at this point, the result might be the imposition of an unfair burden founded upon a groundless claim. In addition to the probability of encouraging frivolous class actions, such a step might also result in defendants' passing on to their customers, including many of the class members in this case, the expenses of defending these actions.

A. Considerations in Allocating Expenses of Notice

After reviewing all of the submissions and arguments of the parties to date, I conclude that I cannot now fairly decide the question of who shall bear the expense of the Rule 23(c)(2) notice. There are various considerations which lead to the conclusion that, in the context of this case, it may be appropriate to impose a share or a substantial portion of the notice expense on the defendants.

First, the issue of who shall bear these expenses has not been decided as one rule to be applied to all cases. Although some courts and commentators have assumed that plaintiff shall always pay the cost in the first instance,¹³ some have also declined to make such an assumption and recognized the propriety of apportioning the burdens in

13. See *Weiss v. Tenney Corp.*, 47 F. R. D. 283, 294 (S. D. N. Y. 1969); *Richland v. Cheatham*, 272 F. Supp. 148, 156 (S. D. N. Y. 1967); Ward and Elliott, *The Contents and Mechanics of Rule 23 Notice*, 10 B. C. Ind. & Com. L. Rev. 557, 566-67 (1969); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, *supra* at 398 n.157; Frankel, *Amended Rule 23 from a Judge's Point of View* in Symposium, "Amended Federal Rule 23: Antitrust Class Actions?" 32 A. B. A. Antitrust L. J. 251, 300 (1966). Compare Wright, Remarks to Judicial Conference of the Third Circuit, 42 F. R. D. 437, 565 (1966) with Wright, *Class Actions*, 47 F. R. D. 169, 180 (1969).

certain cases.¹⁴ Indeed, despite the apparently unequivocal language in *Eisen II*, *supra*, the Court of Appeals for this circuit has indicated in a subsequent opinion that the question is still an open one. *Green v. Wolf Corp.*, 406 F. 2d 291, 301 n. 15 (2d Cir. 1968). I think that the better view is that the decision on this question, whenever required because of plaintiff's inability to pay, is an appropriate area for the exercise of the court's discretion, "having in mind the objective of enabling the class action device to be used effectively to prosecute a meritorious claim (instead of being foreclosed as too expensive) and at the same time restrained from being converted into a vehicle for harassment by frivolous claimants." *Berland v. Mack*, *supra* at 131. To the extent that this may result in the imposition of a burden on defendants prior to trial, analogy to the preliminary injunction remedy lends some support. A prime policy consideration underlying preliminary injunctive relief may be applicable here, viz., the need to create or preserve a state of affairs which will enable the court to render a meaningful decision. See Note, *Developments in the Law—Injunctions*, 78 Harv. L. Rev. 994, 1056 (1965).

Second, this court cannot overlook the serious nature of the antitrust claims in this suit when viewed against the strong public policy behind the antitrust laws in general, and the fundamental role of the private treble-damage action in enforcing those laws in particular. See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U. S. 100, 131 (1969); *United States v. Borden Company*, 347 U. S. 514,

14. See *Bragalini v. Biblowitz*, CCH FED. SEC. LAW REP. ¶ 92,537 (S. D. N. Y. Dec. 16, 1969); *Herbst v. Able*, *supra*; *State of Minnesota v. United States Steel Corporation*, 44 F. R. D. 559, 577 (D. Minn. 1968); *Dolgow v. Anderson*, *supra* at 498-500; Note, *Class Actions Under Federal Rule 23(b)(3)—The Notice Requirement*, 29 Md. L. Rev. 139, 156 (1969); Note, *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 Harv. L. Rev. 874, 938 (1958).

518 (1954); *Monarch Life Insurance Company v. Loyal Protective Life Insurance Company*, 326 F. 2d 841, 845 (2d Cir. 1963), cert. denied 376 U. S. 952 (1964). In a case such as this, even if the Securities and Exchange Commission were to bring its own action, it would be limited to seeking an injunction only, practically less than an adequate remedy since many of the alleged practices of defendants have been subsequently modified. The private class action is the only means of providing for repayment of any alleged illegal profits. See *Dolgow v. Anderson*, *supra* at 482-83.

Third, because the statute of limitations has now run in regard to the claims in this case, no one else will be able to pursue the offenses alleged here, not even the government. See *Green v. Wolf Corp.*, *supra* at 301 n. 14. But see *Philadelphia Electric Company v. Anaconda American Brass Company*, *supra* at 461. In sum, plaintiff's action provides the only available means of reaching the merits of this controversy.

Fourth, after reviewing the purposes and structure of Rule 23, the Court of Appeals has specifically held that it is to be given a liberal rather than a restrictive interpretation. *Eisen II* at 563.

Fifth, the public interest in this case is at least theoretically great, not only because of the serious nature of the antitrust claims, but also because of the large number of persons affected by the allegedly illegal overcharge. The New York Stock Exchange and its member brokers owe very important duties to investors, see generally 15 U. S. C. §§ 78a *et seq.* (1964), and this suit directly raises questions concerning public confidence in the stock market and its fiduciary institutions. Cf. *Silver v. New York Stock Exchange*, 373 U. S. 341, 349-50, 359 (1963).

Sixth, a class action will provide important *res judicata* effects for defendants, although it is true that this consid-

eration is of little importance here because the statute of limitations has run.

Seventh, and finally, although the court has by no means reached the substance of this case as yet, there are bases for presuming merit in plaintiff's claims. In view of the SEC SPECIAL STUDY, *supra*, and the NYSE cost study and subsequent reduction of the odd-lot differential by approximately \$5,000,000 per year, this cannot presently be characterized as a frivolous suit. From this it follows that it would be unfair to tax plaintiff with the cost of paying for notice at this point.

B. Preliminary Hearing on Merits

Before considering how to apportion the costs of notice, if plaintiff cannot pay, the court itself must have a preliminary but reasonably thorough view of the merits of the case. See *Berland v. Mack*, *supra* at 132. Cf. *City of New York v. International Pipe and Ceramics Corporation*, 410 F. 2d 295, 297 (2d Cir. 1969); *Green v. Wolf Corp.*, *supra* at 294. Again, an analogy to the preliminary injunction is helpful: before imposing a burden on defendants prior to trial, plaintiff must make a strong showing of likelihood of success at trial on the merits. See *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F. 2d 738, 740 (2d Cir. 1953). Such a procedure is allowed even though the court cannot be assured of plaintiff's final success, particularly where the ultimate issues are to be decided by a jury. *Id.* But see *Berland v. Mack*, *supra* at 132.

In this case, the most efficient way for the court to become sufficiently aware of the merits of plaintiff's claims to make a reasoned decision on the cost of notice is to hold a preliminary hearing on the merits similar to that originally suggested in *Dolgow v. Anderson*, *supra* at 501. Although such a hearing has been considered and rejected

by several courts, the facts and circumstances of those cases were markedly different from those at hand, thereby rendering those decisions distinguishable.¹⁵

Holding a preliminary hearing at this stage will allow the parties to conduct significant discovery, limited by the date set for the hearing. See *Dolgow v. Anderson, supra* at 502. There may be some duplication of discovery if notice should eventually go out and other counsel for plaintiffs intervene, but the court undoubtedly will be able to control any such problems.

The preliminary hearing will also serve to place the risk of success equally upon the class and defendants without requiring a crucial determination prematurely. Although it is true that counsel for other class members who later choose to intervene will not be able to participate in this preliminary hearing, this is a necessary concomitant of the procedures required by Rule 23. Moreover, the court has already determined that plaintiff's counsel adequately represents the class.

I have also determined that a preliminary hearing is superior to other possible procedures. One such alternative would be to allow the action to proceed to a determination on the merits before assessing the costs of notice and send notice only if plaintiff is successful. Compare *Union Carbide and Carbon Corporation v. Nisley, supra* with *Oppenheimer v. F. J. Young & Co.*, 144 F. 2d 387 (2d Cir. 1944). This suggestion must be rejected for several reasons: (1) it is at least theoretically contrary to the language of Rule 23 calling for an early determination

15. See *City of Philadelphia v. Emhart Corp.*, 14 F. R. Serv. 2d 332, 334 (E. D. Pa. 1970); *Fogel v. Wolfgang*, 47 F. R. D. 213, 215 n.4 (S. D. N. Y. 1969); *Berland v. Mack, supra* at 132; *Mersay v. First Republic Corporation of America*, 43 F. R. D. 465, 469 (S. D. N. Y. 1968). But see *Green v. Wolf Corp., supra* at 301 n.15; *Cannon v. Texas Gulf Sulphur Co.*, 47 F. R. D. 60 (S. D. N. Y. 1969).

of the class action question; (2) in effect it amounts to "one-way intervention," a procedure the rule was designed to avoid, Advisory Committee's Note, *supra* at 105-06; (3) counsel for other class members may desire to participate at an early stage. Another alternative might be to simply allow the action to proceed with discovery and pre-trial motions, postponing a decision on the cost of notice until some unspecified later date. See *City of Philadelphia v. Emhart Corp.*, *supra* at 335-36. This, however, may well lead to a point at which the court and the parties become "hopelessly entangled in a mass of procedural detail and expense." *Eisen II* at 570.

Finally, after the hearing and after all papers have been submitted, a motion for summary judgment by either side may be appropriate, cf. F. R. Civ. P. Rule 12(b)(6), but I am quick to point out my reluctance to treat the proceedings as a forerunner to such a motion and my inclination to limit any determination solely to the question of who shall bear the expense of the Rule 23(c)(2) notice. See *Dolgow v. Anderson*, — F. 2d —, Docket No. 33719 (2d Cir., filed Sept. 2, 1970). Summary judgment is such a drastic remedy that only in the most compelling circumstances should it be considered without opportunity for participation by other class members.

C. Nature of Preliminary Hearing

The preliminary hearing will be commenced no later than 60 days from the date of the filing of this opinion. This should allow sufficient time for minimum necessary discovery and at the same time prevent the proceedings from continuing longer than absolutely necessary. The hearing itself should be brief, and the parties are encouraged to submit whatever evidence they deem relevant in the form of stipulations, affidavits or depositions to the

extent that they are practicable. Actual testimony should be required only from very important witnesses.

As to the merits of the controversy, the parties are directed to address the following issues: (1) did the brokerage defendants monopolize the odd-lot market on the NYSE from 1962 to 1966; (2) did the brokerage defendants control the competition and the odd-lot differential charge in such market; (3) if such conduct by the brokerage defendants can be shown, did the NYSE breach its duties to investors under the Securities Exchange Act of 1934 by failing to exercise proper control; (4) what were the effects of the alleged anticompetitive conduct; (5) to what extent did the Securities and Exchange Commission exercise actual supervision and review over the conduct of defendants in the odd-lot field during the relevant period; (6) to what extent did the regulatory scheme set up under the Securities Exchange Act of 1934 perform an antitrust function; (7) was the conduct of defendants necessary to make the Securities Exchange Act of 1934 work? See, generally, *Silver v. New York Stock Exchange*, *supra*; *United States v. E. I. duPont de Nemours Co.*, 351 U. S. 377 (1956); *Thill Securities Corporation v. New York Stock Exchange*, 433 F. 2d 264 (7th Cir. 1970); 15 U. S. C. §§ 78a *et seq.* (1964). Amicus brief will be invited from the SEC and the Antitrust Division of the Justice Department. See *Thill Securities Corporation v. New York Stock Exchange*, *supra* at 273.

After the hearing the following alternative courses of action are open to the court, all subject to reallocation after trial: (1) plaintiff might be required to pay the entire cost of notice; (2) plaintiff and defendants might share the cost in a proportion to be decided; (3) defendants might be required to pay for a major portion of the cost with plaintiff paying a substantial amount and posting a bond

for the balance allocated to defendants, cf. F. R. Civ. P. Rule 65(c); Note, *Interlocutory Injunctions and the Injunction Bond*, 73 Harv. L. Rev. 333 (1959).

In summary, for the reasons discussed above I have determined that this suit is a proper class action under F. R. Civ. P. Rule 23 and, except for assessment of the cost of notice yet to be decided, it shall go forward as such. The parties are directed to expedite discovery and preparation for the preliminary hearing as outlined in this opinion.

Finally, it should be recalled that the Court of Appeals in *Eisen II* (at 570) expressly retained jurisdiction of the class action determination issue. Admitting to some uncertainty on the point, I believe that in the interests of orderly procedure and a complete record, any appeal should await the outcome of the preliminary hearing directed in this opinion.

It is so ordered.

Dated: New York, N. Y.

April 7, 1971.

H. R. Tyler, Jr.
U. S. D. J.

APPENDIX A TO OPINION OF TYLER, J.
Geographic Distribution of
Shareowners of Public Corporations.

<u>State</u>	<i>Number of Shareowners (thousands)</i>			
	1956	1959	1962	1965
Alabama	30	87	114	172
Alaska	—	3	5	9
Arizona	33	62	95	179
Arkansas	17	50	58	94
California	1,011	1,480	2,037	2,540
Colorado	75	112	157	240
Connecticut	219	300	459	505
Delaware	37	50	75	79
Dist. of Columbia	57	112	126	121
Florida	172	312	522	704
Georgia	65	137	170	243
Hawaii	—	13	18	39
Idaho	10	26	33	43
Illinois	732	874	1,157	1,308
Indiana	117	237	374	382
Iowa	78	125	187	202
Kansas	54	112	157	221
Kentucky	53	100	124	161
Louisiana	64	100	151	149
Maine	56	75	94	123
Maryland	144	237	367	424
Massachusetts	531	512	681	805
Michigan	370	625	794	946
Minnesota	110	175	255	260
Mississippi	15	38	61	92
Missouri	178	325	408	501
Montana	29	37	59	61

<u>State</u>	<i>Number of Shareowners (thousands)</i>			
	1956	1959	1962	1965
Nebraska	36	50	90	99
Nevada	11	13	23	42
New Hampshire	59	50	75	101
New Jersey	554	625	902	1,086
New Mexico	10	37	46	60
New York	1,699	1,903	2,341	2,407
North Carolina	50	125	238	322
North Dakota	11	12	36	30
Ohio	317	587	791	865
Oklahoma	51	100	134	181
Oregon	54	100	152	200
Pennsylvania	671	1,024	1,378	1,408
Rhode Island	84	75	99	122
South Carolina	19	63	71	117
South Dakota	18	25	38	40
Tennessee	57	100	134	201
Texas	160	375	517	744
Utah	23	37	50	78
Vermont	29	37	55	72
Virginia	120	250	302	422
Washington	77	149	202	262
West Virginia	58	100	102	100
Wisconsin	167	212	323	360
Wyoming	12	26	30	41
U. S. Terr. & Poss.	8	3	5	14
Foreign Countries—U. S. Citizens Living Abroad	18	96	138	143

APPENDIX B TO OPINION OF TYLER, J.

	Full Page	½ Page	¼ Page	Circ.
<i>Wall St. Journal</i>				
National	\$19,855.68	\$9,927.84	\$4,963.92	1,262,000
Eastern	7,672.32	3,836.14	1,918.08	520,000
Midwest Edition	6,287.04	3,143.52	1,571.76	390,000
Pacific Coast	3,907.20	1,953.60	976.80	231,000
Southwest	2,344.32	1,172.16	586.08	120,000
<i>New York</i>				
News—Full Run (Daily)	5,530.00	2,765.00	1,382.50	2,130,000
News—City & Sub.	4,940.00	2,470.00	1,235.00	1,805,000
Post	3,492.00	1,746.00	873.00	698,845
Times	8,400.00	4,200.00	2,100.00	977,297
<i>Chicago</i>				
News	3,918.40	1,959.20	1,066.40	453,000
News (Sun. Times—City & Sub.)	2,899.00	1,574.80	787.40	402,000
News (Sun. Times—Full Run)	3,188.90	1,732.28	866.14	453,000
Sun-Times	1,875.00	1,026.00	427.50	530,000
Sun-Times (News—City-Sub.)	1,650.00	906.00	453.00	506,000
Sun-Times—News—Full Run	1,815.00	1,122.00	561.00	530,000
Today—Full Run	1,537.00	864.00	432.00	435,000
Today—(City-Sub.)	1,175.00	720.00	360.00	422,000
Today (Tribune) Full Run (C.&S.)	1,175.00	720.00	360.00	422,000
Tribune Full Run	5,498.00	2,876.80	1,531.00	768,000
Tribune (City & Sub.)	4,615.00	2,467.60	1,351.60	623,000
Tribune (Today) Full Run ..	4,876.00	2,592.00	1,296.00	768,000
Tribune (Today) (City & Sub.)	4,154.00	2,219.00	1,215.00	623,000
<i>Los Angeles</i>				
Herald Examiner	4,009.60	2,004.80	1,052.80	503,000
Times	5,424.00	3,120.00	1,560.00	982,000
<i>San Francisco</i>				
Chronicle	5,658.80	2,829.40	1,414.70	480,000
Examiner	3,347.12	1,673.56	836.78	204,000
Chronicle/Examiner	6,742.40	3,371.20	1,685.60	684,000
<i>London</i>				
Daily Express (D.M.)	12,600.00	6,300.00	3,150.00	3,947,500
Daily Mail (D.M.)	7,800.00	3,900.00	1,950.00	1,992,500
Daily Mirror (D.M.)	9,674.00	4,837.00	2,419.00	4,924,000
Daily Sketch (D.M.)	1,910.00	955.00	475.00	900,000
Daily Tele. & Sun. Tel. (D.M.)	9,300.00	4,650.00	1,325.00	1,400,000
Evening News (D.E.)	7,865.00	3,933.00	1,966.00	1,088,500
Evening Standard (D.E.)	2,886.00	1,440.00	720.00	595,000
Financial Times (Wkly. Bus.)	5,069.00	2,535.00	1,267.00	172,347
Greyhound Express (D.M.) ..	436.00	218.00	109.00	68,000

Appendix B

	Full Page	½ Page	¼ Page	Circ.
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London (cont'd)

The Guardian (D.M.)	3,600.00	1,800.00	900.00	293,000
Inv. Chr. & Stock Ex. Gaz. (W.B.)	600.00	300.00	125.00	50,000
Morning Star (D.M.)	720.00	360.00	180.00	62,000
News of the World (Weekly)	20,259.00	10,129.00	5,065.00	6,228,000
Observer (Weekly)	8,025.00	4,013.00	2,006.00	879,000
The People (Weekly)	17,280.00	8,640.00	4,320.00	5,455,500
Sunday Express (Weekly)	16,200.00	8,100.00	4,050.00	4,206,500
The Sunday Times (Weekly)	12,672.00	6,336.00	3,168.00	1,500,000
The Times (D.M.)	5,750.00	2,875.00	1,438.00	437,500
Sun (D.M.)	1,815.00	908.00	454.00	951,000
Sunday Mirror (Weekly)	9,758.00	4,879.00	2,440.00	5,009,000

Paris

L'Aurore (D.M.)	3,825.00	1,913.00	956.00	329,000
L'Equipe (D.M.)	2,253.00	1,127.00	563.00	365,000
Le Figaro (D.M.)	4,052.00	2,021.00	1,013.00	424,500
France—Dimanche (Weekly)	7,659.00	3,830.00	1,915.00	1,270,500
France—Soir (D.E.)	9,400.00	4,700.00	2,350.00	1,049,000
Le Herisson—La Presse (Weekly)	2,273.00	1,137.00	568.00	400,000
Ici Paris (Weekly)	6,052.00	3,026.00	1,513.00	981,000
Le Journal du Dimanche (W.B.)	4,550.00	2,275.00	1,137.00	550,000
Minute (Weekly)	1,470.00	735.00	368.00	151,500
Le Monde (D.E.)	3,310.00	1,655.00	828.00	355,000
Paris-Jour (D.M.)	1,430.00	715.00	358.00	257,500
Paris-Presse-l'Intransigeant (D.M.)	2,478.00	1,239.00	620.00	50,000
Le Parisien Libere (D.M.)	8,583.00	4,292.00	2,146.00	778,000
La Vie Francaise (W.B.)	3,550.00	1,775.00	838.00	102,500

Rome

Avanti	2,048.00	1,024.00	512.00	130,000
Corrieredello Sport (D.M.)	2,306.00	1,153.00	577.00	191,500
Daily American (D.M.)	1,891.00	946.00	473.00	36,000
Giornale d'Italia (D.E.)	2,884.00	1,442.00	721.00	90,000
Il Globo (D.E.)	2,388.00	1,194.00	597.00	35,000
Il Messaggero (D.M.)	4,450.00	2,225.00	1,113.00	301,000
Momento Sera (D.E.)	2,336.00	1,168.00	584.00	80,000
L'Osservatore Romano (D.M.)	2,453.00	1,227.00	614.00	70,000
Paese Sera (D.)	3,116.00	1,558.00	779.00	180,500
Il Popolo (D.M.)	2,160.00	1,080.00	540.00	106,000
Il Tempo (D.M.)	3,895.00	1,947.00	974.00	220,000
Il Fiorine (D.M.B.)	2,670.00	1,335.00	667.00	49,000

D.M. = Daily Morning

D.E. = Daily Evening

D. = Daily

W.B. = Weekly Business

C.&S. = City & Suburban

APPENDIX C TO OPINION OF TYLER, J.

Plaintiff has brought an action in the United States District Court for the Southern District of New York on his own behalf and on behalf of all other persons who had an odd-lot transaction on the New York Stock Exchange in the period 1962-1966 (the "class"). The defendants are Carlisle & Jacquelin, DeCoppet & Doremus (referred to collectively for convenience as the "brokerage firm defendants") and the New York Stock Exchange. The essence of the action is the allegations that the brokerage firm defendants have monopolized the odd-lot business of the New York Stock Exchange and have conspired to fix an excessive odd-lot differential (the odd-lot differential being the extra amount charged when a transaction on the stock exchange involves fewer than 100 shares) in violation of the anti-trust laws of the United States. It is further alleged that the New York Stock Exchange knew of these wrongs but permitted them to occur. Defendants have denied all the material allegations of the complaint and have denied any wrongdoing whatsoever. The issues of whether any of the defendants are liable and the extent of such liability are complicated and have not yet been determined by the Court.

Since it would be impracticable to return to each member of the class his precise damages the Court has ruled that any recovery, to the extent not asserted by members of the class, will be offset against the odd-lot differential charged in the future.

If you are a member of the class you may be excluded from the class if you so request in writing by [a given date]. A judgment in this case, whether favorable or not, will include all class members who do not request exclusion. Any member who does not request exclusion may, if he desires, enter an appearance through his counsel. You should be advised, however, that if you do choose to be excluded

from the class you may be prevented from bringing your own action because of the running of the statute of limitations.

If you choose to be excluded from the class or if you desire to be represented by your own counsel, please notify the Court by writing to: The Clerk of the Court, United States District Court, Southern District of New York, Box _____, _____ Post Office, New York, New York.

**EXTRACT OF TRANSCRIPT OF RECORD
OF PROCEEDINGS
DATED MAY 17, 1971 (PAGES 5 TO 8).**

. . .

(5) I would say secondly that it seems to us that the notion of a hearing on the merits for the purpose of deciding the allocation of cost of notice is a procedure (6) which, so far as I know, has not yet been passed upon by the Court of Appeals and we believe that it is in conflict with the opinion of the Court in this case.

I would say further that the notion of a hearing on the merits which both sides would of necessity have to present a pretty full case, because your Honor pinpoints out that after this hearing the motion for summary judgment might be in order. I don't think this is going to be a simple matter and we also have the problem of discovery in advance.

The Court: May I interrupt you there?

Mr. Jackson: Yes, sir.

The Court: I thought about that because I anticipated that you would raise that point and perhaps I didn't make it precise enough in my discussion in that already frighteningly lengthy last opinion of mine. But I will be completely blunt about it. I meant to say then and I certainly mean to say now that the burden is on the plaintiff, as I see it, in this mini-hearing, if we use that phrase, and that the defendants are in a very good position if they chose to see it this way in not having any burden at all.

In other words, even if the plaintiff, if you were to accept me at my word and just sit down and say (7) nothing, maybe cross-examine somebody if they are going to produce a witness a little bit, but if you produce no evidence whatsoever, you would be in the very fortunate position of not

being out of court even though you produced no evidence whatsoever.

Mr. Jackson: Well, I think, your Honor, that is not the whole story, because plaintiff has a very diligent and resourceful counsel and there is bound to be discovery which will take a good deal of time in preparation.

The Court: I don't think necessarily I am going to open the door to the greatest and most exhaustive—I am well aware that the holy right of discovery transcends everything else. It has become much more important than trials in my judgment from what I see around here. People exhaust themselves financially and every other way with discovery and when they come to the trial it is very thin gruel, indeed. But I intend to have some control over that. I don't want to see you waste a lot of money and time on that and I don't want to see Mr. Eisen and Mr. Rosenfeld waste a lot of money on that.

I think what could be done is very manageable. Now, I don't mean to say it will be totally easy and, of course, that would be an exaggeration the way other. But, (8) please, I would not tolerate a length [*sic*] adversarial trial under the label of a Dolgow hearing or a mini-hearing. I just think that would be egregiously unfair to everybody.

Mr. Jackson: But I think I should also point out our basic difficulty with this proposed procedure. It is not alone the possibilities of a substantial hearing and substantial discover [*sic*], unless your Honor controls it, but it seems to us that the basic point for which the hearing is to be held, i.e., to decide whether it is possible to make the defendants pay all or any part of this notice, is a very root question of law and that we would—

The Court: I can see that because of the fact that I attempted to cope with in mine and which you know just as

well, if not better than I do, that in Eisen 2 there is that flat statement by the Court of Appeals, even though [sic] I read some other statements of their's postating that opinion to be quite different, there is the flat statement in our case in which they seem to say that the plaintiff should bear the burden of notice.

Mr. Jackson: Exactly. That's our point.

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**TRANSCRIPT OF RECORD OF PROCEEDINGS
DATED FEBRUARY 9, 1972.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

February 9, 1972
2:15 p.m.

Before:

HAROLD R. TYLER, District Judge.

Appearances:

Mordecai Rosenfeld, Esq., Attorney for Plaintiffs, and
Harold E. Kohn, Esq., By: Aaron M. Fine, Esq.,
and Allen D. Black, Esq., of Counsel.

Messrs. Carter, Ledyard & Milburn, Attorneys for De-
fendant Carlisle & Jacquelin, By: Devereux Mil-
burn, Esq., and Louis L. Stanton, Jr., Esq., of
Counsel.

Messrs. Kelley, Drye, Warren, Clark, Carr & Ellis,
Attorneys for Defendant DeCoppet & Doremus,
By: Bud G. Holman, Esq., of Counsel.

Messrs. Milbank, Tweed, Hadley & McCloy, Attorneys
for Defendant New York Stock Exchange, By:
William E. Jackson, Esq., and Russell Brooks,
Esq., of Counsel.

The Court: Why don't we start with Mr. Rosenfeld
and we will see what happens here.

Why don't you make your submission now.

Mr. Fine: We have prepared the exhibits and these
conform to your statement on the record of November 5 in

which you said, "I am going to rule now that from the plaintiffs' point of view I will accept a submission of the study, including any transcripts of testimony of officers or agents of the odd lot defendants," and then Mr. Rosenfeld indicated, a little later on, that, "we plan to offer, also, other sworn testimony not only of partners or employees of the odd lot defendants but of co-conspirators, "and we have prepared a list of nine exhibits for submission in the plaintiffs' case, the first of which is the SEC special study."

I must apologize. We only have a xerox of this. The volume itself is out of print.

The Court: That is all right.

Do you have a list of all these?

Mr. Fine: Yes. I will submit the list and Exhibits 2 through 9 are depositions taken in connection with the study of Carlisle Partners, DeCoppet Partners, individuals employed by one or the other of those companies, and individuals in other exchanges or other odd lot dealers.

This is the list, and I would hope that they could be marked seriatim by the Clerk, 1 through 9 in conformity with that list.

Mr. Jackson: I assume, Mr. Fine, if I may, your Honor, that these documents are those which were listed in Mr. Rosenfeld's letter of November 18? In other words, the transcripts are identical with those therein described.

(Plaintiff's Exhibits 1 through 9 marked for identification.)

Mr. Fine: I may say, your Honor, that long ago we told the defendants before this hearing was set, that these transcripts were all available for their inspection and I assumed they had their own copies because they did not take us up on that offer.

In addition, your Honor, we intend to rely on a number of documents which the defendants have said they are going to introduce in their case, and we didn't want to introduce them in our part of the case because they would simply duplicate exhibits and they are all going to be part of the record.

The Court: All right.

As Mr. Jackson inquired and I didn't hear the answer, I also assumed that really what the plaintiffs are submitting is what is described essentially in the letter of November 18th of Mr. Rosenfeld.

Mr. Fine: I believe so. It includes the individuals who are listed in the letter. It may not include all of them. In other words, I think we have reduced our offer.

The Court: In other words, there may be some depositions in there or transcripts of examinations of witnesses by the Commission that you don't include?

Mr. Fine: That is right. We didn't want to put everything in.

That would conclude our submission.

The Court: All right.

Now, of course, Mr. Stanton and others wish to reserve their rights to object to all or part of this, as we know from his letter of November 24, 1971.

I think, Mr. Stanton, this problem has already been reached and passed, but let me point to your first paragraph, numbered 1.

I am inclined to accept it just about as how you put it. I have always understood that all that would be done here would be to take what in effect amounts to offers of proof from both sides in this mini hearing, with the full understanding and expectation that some of this evidence might

neither be offered at a plenary trial, if such were ever held; or, if it were offered, would not be admitted under then current rules of evidence, and I don't think there should be any doubt about that.

I think you put it very neatly. I have tried to say the same thing, but I don't think I have said it as neatly as you have in paragraph 1.

Mr. Stanton: Thank you, sir. I had more time.

The Court: I think the record should be clear about that. I regard this so-called mini-hearing as somewhat sui generis.

Let's face it; it is not a thing that I, at least, am familiar with heretofore in the conduct of litigations in these courts; but I think the same can be said with respect to your experience. So as long as that is enunciated, I think that ought to take care of the matter.

I don't think the plaintiffs' side ever misunderstood this in any way.

Mr. Rosenfeld: We understand that they have whatever rights they have to object at such time as there is a hearing. They are not waiving anything by going through this hearing.

The Court: I want that clearly understood. Neither are you.

Mr. Rosenfeld: Absolutely.

The Court: Is there anything else you want to add to that, Mr. Stanton?

Mr. Stanton: With respect to the balance of the plaintiffs' offer, your Honor, I would simply hand up the letter of November 24, 1971, from myself to your Honor—

The Court: I have that.

Mr. Stanton: —with the written statement of objections and now urge those objections, continue to urge them, and assert the provisions there expressed.

The Court: I'm going to view these as matters going to the weight of these various depositions.

As you point out, and accurately, I'm sure, a great many of these depositions were really not depositions in the classic sense of that word as used by us lawyers. They were recorded interviews more than they were depositions, in last measure taken by representatives of the Commission's staff.

This means, among other things, that certain of the defendants in this case didn't have anybody present and knew nothing about it at the time.

It means that certain persons were examined who though perhaps an employee of one or more of the defendants were not managing agents or officers whose testimony could be regarded as binding that particular party.

I think I should and will recognize those factors, but I'm not going to use them as an absolute bar to keep the transcripts out, because I think we are not really trying to determine the truth of the merits of the case at all, we are trying to do something quite different, as I see it: to get a broad overview preliminarily; to see, for example, whether or not there might be sufficient merit to the trial or other resolution to allocate expenses. That is what we are trying to do, as I see it.

So what I'm going to do is take your paragraph 2 and keep it with me as I read this material and factor it in. It may make a great deal of difference in certain instances.

Mr. Stanton: I think your Honor has perhaps already dealt with paragraph 3, and so it leaves—

The Court: That is right. I hope that I dealt with that long ago. I think either you or William Jackson raised this

in one of our proceedings late in the fall and I tried to say then that I quite agree that no one should be bound by anything that happens in our mini-hearing as constituting any rulings on evidence which might come up at trial.

Mr. Stanton: If I could, your Honor, I would urge upon you once more the thought contained in the last paragraph of the letter and ask that it be marked for identification.

The Court: Yes. That, of course, gentlemen, is the continuing exception which the defense has stoutly maintained all along, to my knowledge; that they object to the whole concept of the mini-hearing.

Mr. Stanton: Perhaps if we mark the letter, then, since we have discussed it on the record—

The Court: I don't mind marking the letter, but I deem it part of the record.

Let's just say that I deem the November 24 letter of Carter, Ledyard & Milburn by one of its members, Louis L. Stanton, Jr., to be part of the record of our hearing.

Now, Mr. Jackson, I gathered you were going to do the laboring for the defense table.

Mr. Jackson: Yes, insofar as the documents are concerned, your Honor. I have two bundles of documents, which I should like to offer for marking, individually, as defendants' exhibits.

And these are the documents which I described in my letter of December 31 to Mr. Rosenfeld, a copy of which was sent to the court.

That letter describes 17 separate documents, copies of which were subsequently furnished to Mr. Rosenfeld.

It includes the "odd lot" cost study of 1964 by Price Waterhouse, which your Honor has heard something about, and it includes other letters relating to that study, relating

to the position of the Anti-Trust Division on the merger of the two firms here involved which we think has a bearing on the issues; various other documents, some of which is correspondence of the Securities and Exchange Commission, and also including minutes of Securities and Exchange Commission which we think demonstrates the absence of the claim of conspiracy alleged and also evidences active regulation by the Exchange in accordance with its statutory duties.

With that brief word of explanation as to what these documents are about, and without burdening the court with reading from any of them at this point, I should like to offer those 17 documents and suggest that the copy of my letter which I referred to be marked for identification as an index to the documents.

The Court: I have that in front of me, a copy of your letter of December 31, 1971, addressed to Mordecai Rosenfeld and I think we should deem that part of the record here, too.

Mr. Jackson: Very well, sir.

(Defendants' Exhibit [sic] A through Q marked for identification.)

Mr. Jackson: In addition, your Honor, on behalf of the defendants I should like to offer the 19 separate documents described in my letter to Mr. Rosenfeld of February 7, a copy of which, unfortunately, was not sent to your Honor.

The Court: I was going to say, that is what I didn't remember seeing.

Mr. Jackson: If I may hand it up, here is a copy for your Honor.

Copies of those documents have previously been furnished to Mr. Rosenfeld.

I should like to ask that they be marked seriatim, commencing with Exhibit R, please, and perhaps the copy of my letter of February 7th could also be deemed a part of the record for index purposes.

The Court: Yes. We will take my copy, which you just gave me, and deem that a court record document.

(Defendant's [sic] Exhibits R through AJ marked for identification.)

The Court: That completes the defense submission?

Mr. Jackson: Yes, sir, it does, your Honor, as far as we are concerned.

Mr. Holman: Your Honor, a housekeeping point.

I note that plaintiffs have left two sets of their exhibits on the defense table but there are three defendants. Could Mr. Rosenfeld ship another copy of their exhibits to us this week?

Mr. Rosenfeld: We will do that, your Honor. We just didn't carry over that many copies.

Mr. Holman: Send it to my office and we will leave the other two defendants to take the copies you have left here.

The Court: What do you claim all this shows, Mr. Rosenfeld, or Mr. Fine?

Mr. Fine: If your Honor please, it is the plaintiffs' position that this makes a very strong showing of liability on the part of the "odd lot" defendants and on the part of the Exchange.

The strong showing that we already had at the conclusion of our offer has been fortified by documents which the defendants have put in.

For example, I think one document they put in describes the plaintiffs' case in a nutshell. That is the letter of September 17, 1969 from Mr. MacLaren [*sic*], the head of the Anti-Trust Division, to Mr. Budge, chairman of the SEC, and on page 2 in a footnote, he gives as the opinion of the Anti-Trust Division that "historically, the 'odd lot' differential rates have been fixed by agreement between Carlisle and De Coppet, who together have put pressure on regional exchanges and others not to deviate from them."

This is the price-fixing aspect of the case as to which I think, frankly, there is no defense. I think it is a documentary case, the kind of documentary case which the Supreme Court, for example, in an Anti-Trust decision, which we will cite in our brief, the Krusnoff case, held that summary judgment for the plaintiff was proper.

Mr. McLaren goes on in this letter to describe how the "odd lot" defendants had deliberately held back any kind of automation which would have reduced the costs that were imposed on "odd lot" traders and even in 1969 was expressing doubts that they would do anything about it.

Now, that is the anti-trust, price-fixing part. You also have the pressure on others to prevent any competition. You also have the holding back of cost reduction, and automation.

All of this is spelled out in documents, not only in the special study but in documents that the defendants themselves have put in and which I think they would have to admit, for example, if we were before you on a summary judgment motion, on requests to admit.

The other aspect of the case is clear. It is also clear from the documents that neither the New York Stock Exchange nor the SEC did anything during the period involved in this suit to regulate the "odd lot" differential.

For example, another document the defendants have introduced, minutes of the SEC itself of January 23, 1951,

in which Mr. Hanrahan was appearing for the two "odd lot" firms to sound out the SEC on a proposed joint increase in the "odd lot" differential—and these minutes say Mr. Hanrahan, who was counsel for the "odd lot" dealers, stated that, "The New York Stock Exchange was of the view that it had no jurisdiction over the differential to be charged by 'odd lot' dealers in executing 'odd lot' orders," and this goes on, "The director"—and this is the SEC—"of Trading and Exchanges stated that he doubted whether the Commission had jurisdiction in the matter."

However, he pointed out that §11 of the Act conferred upon the Commission certain powers over "odd lot" dealers, and that §19 of the Act, relating to the Commission's powers with respect to national securities exchanges and securities gave the Commission authority to request exchanges to alter their rules in respect of various matters, including "odd lot" purchases and sales.

"The director also pointed out that all of the national securities exchanges except the New York Stock Exchange had rules relating to 'odd lot' dealers; that some years ago, and again a few months ago, the staff had requested the New York Stock Exchange to consider the advisability of adopting rules relating to 'odd lots' but that the Exchange had not taken any such action to date."

So that, here you have them jointly fixing the rates and you have a disavowal by the Exchange of any jurisdiction over the rates, a disavowal which continued, by the way, into 1965, when the amendment to the registration statement which the Exchange filed in that area with the SEC said that the "odd lot" differential was that imposed by the "odd lot" dealers.

Now, it is true that after the special study there were various studies that were put in motion, but until the

middle of 1966 the "odd lot" differential and rate as imposed by the "odd lot" dealers without any regulation, remained in effect; and finally in 1966 the SEC delivered a letter to the Exchange, June 16, 1966—again this is a document introduced this afternoon by the defendants—containing this language:

"The Commission hereby makes written request, pursuant to § 19B of the Securities and Exchange Act that the Exchange effect on its own behalf changes in its rules and practices in respect of 'odd lot' purchases and sales and the fixation of reasonable rates of commission and other charges in connection therewith to fix odd-lot differentials so that on 100-share unit stocks the differential on stocks selling for not less than 55 shall not be more than a quarter of a point, and on stocks selling below that point but for more than 5/32nds, the differential shall not be more than one-eighth of a point."

And as a result of that, which is the first time that the SEC really assumed jurisdiction and asked the New York Stock Exchange to assume its responsibility for regulation which it had completely neglected before that, as a result of that, according to another exhibit which the defendants have put in, that is, the report of the Special Committee on "Odd Lots," June 14, 1966, there would have been a saving by their calculation during the period in suit of \$5 million a year to the "odd lot" traders.

So that you have here, apart from any question of whether there is an immunity defense, which I shall come to, you have a classic case of price-fixing as to which the cases are clear that there is no defense. It is a per se violation and the only possible defense in this case would be that of some kind of immunity.

But I think it is clear from the Supreme Court's decision in *Silver* and the decision of the Second Circuit in the

Thill case that there is no immunity here because, first of all, there wasn't even a pretense of regulating this rate by the New York Stock Exchange and if the Stock Exchange had undertaken its duty and discharged it, of course we would have had the results at the very minimum which were calculated after it did do something in 1966.

I think that it cannot possibly be said on this record, where there was no supervision, that the *Silver* test could possibly be met, and that is that Exchange activities are exempt from the anti-trust laws, and then this is a quotation from the Supreme Court decision:

"Only if necessary to make the Securities and Exchange Act work, and even then only to the minimum extent necessary."

And, of course, in *Silver* and *Thill* you had a situation where there had been some rule which was adopted regulating the activities involved in those cases.

Here, where you had no rule, whereby statements made by the Exchange itself, as well as by the odd-lot dealers—they had deliberately abdicated any statutory obligation to regulate the rate—I don't see how they could possibly come within the immunity defense.

So that you have a per se violation. Since it is a price-fixing case, of course, the plaintiffs and the class have to show, before they are entitled to recovery, some injury and damages, but I think that we have enough evidence so that we can say there is clear injury and damages to the class within the applicable decisions, the *Bigelow* case in the Supreme Court, Judge Feinberg's decision in the *Electrical* case, which he tried, the *Ovec* case, where you can take the situation before and after and compare them and see what the difference was, and here it amounts to at least \$5 million per year, and there are also other decisions, I think *Union Carbide* may be one, and others,

where the courts have held that where you have a price-fixing violation of long standing from the very existence of it you can presume that there has been injury and damages.

So that, first of all, on the count of the complaint against the odd-lot dealers you have a strong showing and I think we could with very few additional documents from the defense make out a summary judgment showing of violation of the anti-trust laws, and I think we can also make a similar showing with respect to the New York Stock Exchange's failure to fulfill its duty of regulation within, for example, the principles of Judge Gurfein's recent decision in the Weinberger case.

Now, all of this, of course, bears on the issue before the court, which is who should pay the cost of notice, and there was a discussion in Judge Weinstein's decision in the *Dolgow* case that if the plaintiff could make a strong enough showing of liability the cost could be put on the defendants.

There are cases where the cost has been put entirely on the defendants. There is one in this District, the Bragalini case, and I think there is one which we will add to our brief that was just decided by Judge Lasker.

You suggested, your Honor, in your opinion that we might make analogies to various other situations; for example, what the plaintiff might have to do in posting security on a preliminary injunction.

There are cases which we will also cite in our brief where the court has been held to have the discretion to dispense with any security even in the preliminary injunction situation.

There is also the analogy of progressive statutes in various states in stockholder litigation where if the plaintiff makes a strong enough showing at a preliminary hear-

ing on liability, he has to post no security under the State security statutes.

There is also the principle of the case of Mills against the Electric Auto Lite Company in which the Supreme Court held that if you make a showing of violation of the proxy provisions of the Securities and Exchange Act even before you go on to prove that there was any injury or damages resulting from the violation, the plaintiff would be entitled to an award of costs and counsel fees.

There is a recent decision in our District in Philadelphia, the Eastern District of Pennsylvania, the case of Bright against the Philadelphia-Baltimore-Washington Stock Exchange, where it was found that the Exchange had violated a statutory duty, and as a result of the finding the judge said that under the principles of Mills he would impose costs and counsel fees on the Exchange.

I think we have a similar situation here, and that is we can show by the documents put in by the defendants themselves, as well as the special study that the Exchange has violated its statutory duty of regulation. It really abdicated that duty, was completely derelict in what it should have been doing, and finally, when it did do something, the results were evident. So that under the Mills principle as followed in the Philadelphia-Baltimore-Washington case, I think that is another basis on which the court could impose the costs on the defendant, the Stock Exchange, and equally on the anti-trust defendants.

Now, I'm reluctant to mention another ground on which we would urge, your Honor, that it would be appropriate to impose costs on the Exchange because I know you have already ruled that there was no settlement here. But, on the other hand, it has been our position that there could have been a settlement if it had not been vetoed by the Board of Governors of the Exchange.

We asked the defendants to let us have something that we could put into the record, the minutes of the two meetings where we believe that took place, and we asked them again this morning if they would have those minutes in court, but they declined to produce them and we think that if the minutes do show that the settlement was frustrated by this veto of the Stock Exchange, it would be an appropriate ground on which to base a ruling that the Exchange ought to bear the cost of the notice, because obviously—

The Court: You mean alone?

Mr. Fine: I think so, your Honor, because you have already found that the other defendants didn't make a settlement, but if that was because the Exchange had interfered with the settlement, I think it would be equitable for the Exchange, for that very reason, to bear the cost of notice alone, and we urge that upon your Honor because in these class actions which are settled, of course, the cost of notice is readily paid out of the settlement fund.

I would like to touch on the subject of summary judgment. I know that in your opinion you said that you were reluctant to deal with that situation prior to the sending of whatever notice is determined as appropriate for sending to the class, but since that decision there are two cases I know of in which class actions summary judgment has been entered for plaintiffs prior to the sending of the class notice.

The Court: That may well be, but if I can interrupt, you recall we have a somewhat *sui generis* problem here. It stems from the Court of Appeals' second opinion in this case which remanded the matter here for further hearings on the class action determination issue and they said, as I understood them, and still understand them, that they were somehow retaining jurisdiction of this question, a matter

which I have had occasion before to raise some questions as to what that really means, but be that as it may, one of the things it means to the defendants, as you certainly know from your friend and co-counsel, Mr. Mordecai Rosenfeld, is that they intend to jolly well get back up on Appellate Review and, indeed, have already tried, unsuccessfully, for the moment because apparently the Court of Appeals agreed with my view that we'd better decide the cost allocation before they get upstairs.

So this is a little bit special, as I see it, or at least I can see good reasons why those cases you have properly called to my attention—I don't know which ones you refer to, but I know there have been cases where summary judgment has been granted prior to notice going out under Rule 23.

Mr. Fine: I am simply suggesting, your Honor, that it would be a proper part of such a record to go before the Second Circuit, if summary judgment were appropriate, that it be considered and granted because in deciding who should bear the cost of the notice, the question of summary judgment is a proper standard within the decision of the Supreme Court in the *Mills* case, and it might save time all the way around if indeed, as we submit, the plaintiff is entitled to summary judgment certainly on the price-fixing part of the anti-trust case and on the application of regulatory responsibility on the count against the Exchange that would be most material, I would think, for this Court and for the Second Circuit on any appeal that it might entertain to consider because that might dispose completely of the question of who should pay for the notice.

The Court: Of course, as you are implying in this submission, and I'm inclined to sympathize for you, the tragedy is that there has been much water gone over the millrace since the Court of Appeals wrote what I think is

usually called Eisen II, at least by this judge—I don't know about anybody else—and we are all a lot more educated than we were in those days, but I think probably my own view is that we have got to stick to what this Court of Appeals said—it is the law of the case—and I want to get this cost allocation problem out of the way and then, of course, if you want to move for summary judgment, why you certainly may.

Mr. Fine: Then I will rest on that point by saying that I think we will be able to persuade you in our brief that this is a case which would have been appropriate for summary judgment on the issue of liability from the plaintiffs' standpoint and that therefore that is a consideration in directing that costs be paid by the defendants.

Of course, you still have the situation where Eisen is a single plaintiff with a small stake and any imposition of costs on him would be a great burden for him to bear, and in this kind of situation, where the showing of liability is so strong, we would urge you to follow those cases where costs have in fact been put entirely on the defendants.

Now, I know there is some language in the Second Circuit opinion which seems to indicate that the plaintiff should bear the costs, but I have looked at the briefs in the Second Circuit. It was never argued that the defendants should bear the burden, and the law has developed in a great many cases since then.

The Court: Right. And they themselves have had quite different observations in subsequent cases.

Again, I think in fairness to them we have got to recognize as to that opinion that it was at a comparatively early stage under the amended rule and they had not had occasion to focus upon the problems in this area to the extent that, of course, they and other courts now have had over the years.

I don't know, but perhaps they might still take the same view. I don't know. That is their prerogative. But all I'm saying, of course, is the obvious. I covered that, as you know, in my last substantive opinion.

Let me just ask you one thing:

I gather from what you say, you want to submit another brief.

I cringe for your sake and all of our sakes. On the other hand, I suppose that it might make some sense to do it, even though I hate to see more time go by.

What would you like to do? Let's start that way.

Mr. Fine: We can submit a brief by next Friday, and if our office multilith machine were not involved in another class action it might be by Wednesday—I mean, Friday of next week.

The Court: Friday a week, the 18th.

Mr. Fine: Yes.

The Court: May I suggest something that I think might reduce your efforts in time, and correspondingly, the defendants' efforts in time, and I think would be certainly acceptable to this Court and myself as a representative of the court, and that is this:

Just a very summary exposition, really just fleshing out a very little bit what you have articulated this afternoon, which I thought you articulated so that I understood you, and one way of doing it would be to say: we believe that this record establishes that plaintiffs make a case of price-fixing, per se price-fixing, see exhibits, in particular numbers blah, blah, blah and blah blah.

Do you see what I mean?

And then all the rest, and just key it that way.

The Court: I think that would really be sufficient; and then, of course, when you want to anticipate any immunity

defense, for example, you can cite *Silver* and I know all about *Silver* because I have been talking about it in the last opinion. But, nevertheless, there is no reason why you can't key it that way, too.

Does that sound like a relatively simple and sensible way to proceed?

Mr. Fine: Yes, sir.

The Court: All right. That is perfectly fine. I am delighted with your suggested time, too, Friday the 18th.

Mr. Fine: Thank you.

The Court: Now, Mr. Jackson, I would suppose that from what you and your colleagues have been saying, that you would like to submit something, too?

Mr. Jackson: Yes, your Honor. And I would also like, if your Honor would permit me, the privilege of responding as briefly as I can.

The Court: Yes, I intended to; but while we are on this administrative matter of time, and what you would like to submit in writing, why let's clear that up as to what you would like to do.

Mr. Jackson: We would like time to respond to Mr. Fine's brief.

The Court: How about the 25th of February, one week thereafter, along the limited lines I have tried to sketch out, which I assume basically you understand?

Mr. Jackson: I think it would be rather difficult to do it in less than two weeks, your Honor.

It has just been pointed out that there is a holiday intervening.

Mr. Fine: Perhaps we could make our submissions on the 18th and both reply—

The Court: I was going to say that particularly if Mr. Fine and Mr. Rosenfeld stick to this somewhat reduced type of brief that I was endeavoring to describe, I see no reason why the defense couldn't put in the same thing, particularly since you know basically what their argument is, anyhow.

I really don't want to prolong this any more than I have to. I know you are busy people.

I think that what I will do is to direct that both sides put in a brief, as brief as you can make it, along the lines I suggested, on the 18th with full reservation to either side to phone my chambers and say, "well, he has said something that really I must answer," and then they will just agree on a simple letter answer, or whatever.

So February 18 for both sides.

All right, now, while you are on your feet you certainly have the floor to respond to these charges against the New York Stock Exchange.

Mr. Jackson: If your Honor please, I don't intend to go into this in any detail, at this point.

The Court: Surely.

Mr. Jackson: There are a few high points, perhaps, that I would like to mention.

In the first place, the suggestion that the matter which I thought was closed, this business of a settlement, should be dragged out on the issue here presented seems to me to be preposterous.

It does not follow, in my way of thinking, that just because the costs of notice to the class where there is a settlement are borne by the defendants, that they should be borne by the defendants where the defendants refuse the settlement. It just doesn't make any sense.

As to the suggestion that the criteria for summary judgment might be in any way applicable on this mini-

hearing, I think my learned friend has overlooked the guidelines that your Honor laid down sometime ago as to this hearing.

While I can't quote them from memory directly, I think I have the substance in mind when I say that your Honor directed that on this mini-hearing the plaintiff had the full burden and that the defendants could sit back and perhaps they could do nothing whatsoever; and I think that that should be the proper standard as your Honor laid it down.

The Court: Let me just pause there.

Accepting that essentially, I don't think that Mr. Fine's argument is quite answered by that.

What I think he is really saying is now that they have made their submission on the mini-hearing, they are inclined to think that, with the possible addition of some more documents they really have enough upon a motion for summary judgment. That is the first part of it.

And the second part—and Mr. Fine, you correct me if I am wrong in my description of my understanding of your argument, Mr. Fine would then say that if that is so, it carries a powerful weight or argument to the effect that plaintiffs have certainly carried their burden here at this mini-hearing and they have carried that burden sufficient to show that the defendants should pay the whole cost.

Isn't that a rough but fair summary of your position?

Mr. Fine: A very fine summary of it.

The Court: All right.

Mr. Jackson: I think that perhaps if when the court examines some of the documentary material which we have offered this afternoon, that this statement of counsel may turn out to be a little optimistic.

The Court: That could be.

Mr. Jackson: However, I think the basic point to be borne in mind, your Honor, is this:

Since October of 1966 the "odd lot" break point has been fixed uniform for all firms acting in the odd-lot business by virtue of the order of the United States Government.

The documents which we have put in show that the Securities and Exchange Commission sent the Exchange what is known as the Section 19B letter in June of 1966, requesting that the Exchange change the odd-lot break point.

Now, that request was not just a polite little formality. It was a request which had the force of law under Section 19B of the Exchange Act, because had the Exchange declined to comply, the Commission was authorized by the statute to compel the Exchange to comply, and the Exchange in October of 1966 did comply and it changed the odd-lot differential by rule to accord with what the SEC had requested it under threat of statutory compulsion to do; and I submit to your Honor that it is fundamental that activities undertaken by order of the government cannot constitute a basis for an anti-trust claim; and secondly, that the Exchange's action in changing its rule at that point certainly amounted to regulation within the meaning of the Exchange Act because it was acting at the express behest of the Commission. So that I think the starting point is that there can't possibly be any claim under the anti-trust laws or under the Exchange Act for anything that occurred after October of 1966.

Then the only question is whether there is any colorful claim with respect to activities prior to that date which fall within the four-year statute of limitations under the anti-trust laws or probably the six-year statute would be applicable to the claim against the Exchange.

As to the anti-trust claim, I, of course, cannot speak for the "odd lot" house defendants, but I can say a few things, which they may disagree with or wish to add to.

In the first place, Mr. Fine's argument about price fixing and per se violations of the anti-trust laws is a very interesting argument when it is limited to the industries which were involved in the cases which he is talking about.

This case is not a case that can be at all analogized to a conspiracy among steel mills or steel companies to raise the price of plate or to fix the price of plate, or bakeries to fix the price of bread, or gasoline manufacturers to fix the price of gasoline, because this is a regulated industry. It is regulated in two ways:

First, by the Exchange as a self-regulator, carrying out historic duties granted to the exchanges of this country under the common law and carried forward under the Exchange Act.

And secondly, it is regulated by the Securities and Exchange Commission, pursuant to a very intricate and unique statutory pattern set up in the Exchange Act.

So that the per se cases of price fixing just don't apply, as was established beyond question by the Seventh Circuit Court of Appeals in the Kaplan case, in which it was held that the Exchange's minimum rules of commission did not constitute a per se, indeed, did not constitute any violation of the anti-trust laws by virtue of the existence of an SEC oversight under the pattern of regulation established by the Exchange Act, and certiorari was denied in that case.

In this case we have what in effect has been a rule of the Exchange since the time that the Exchange was first registered as a national securities exchange in 1934.

Included among the documents submitted to your Honor by defendants are the original registration statement of the Exchange and the annual amendments thereto, in which

the Exchange was asked to respond to this question, in effect, "do you, Mr. Exchange, have any rules or any practices amounting to rules governing the odd-lot business?"

And the Exchange in each case replied, "We do. We have settled practices under which we permit odd-lot business to be done at the differential established by the odd-lot dealers."

And we think that those facts, coupled with pertinent provisions of the Exchange Act itself, show that while the practice was called a practice, rather than a rule, for regulatory and for anti-trust purposes it had the effect of a rule of the Exchange governing the odd-lot business.

Now, I would go further and say that even if this was a case where there was not a defense of immunity from the anti-trust laws, there certainly is a defense of the rule of reason, and this was recognized by the Supreme Court in the Silver case, in which it pointed out that even though there might not be an immunity for a certain exchange activity under the aegis of the rule of reason, the exchange should be granted sufficient breathing space so that its regulation could be effective and not thwarted by anti-trust lawsuits.

I don't want to enlarge any further on the anti-trust aspects, because the Exchange is not a defendant on that charge. And let me now just turn for a moment to the charge the Exchange failed to regulate the odd-lot business.

As I have said, commencing in 1934 the Exchange advised the SEC annually that it had practices, settled practices, amounting to rules governing this business.

Well, that wasn't all. In 1938, for example, in a document dated November 1938, entitled, "The Odd-Lot Dealers' System," a copy of which has been offered by defendants today, the Committee on Court Procedure in the Exchange addressed itself very specifically to the question

of the differentials at which odd-lot dealers should do business, and the Committee came to the following conclusion, which is expressed on page 3 of that document:

"The Committee does feel, however, that the differentials in which odd-lot dealers do business should be the same."

This is the committee of the Exchange.

"The Committee believes that price competition between odd-lot dealers is detrimental to the best interests of the Exchange and a cause of embarrassment and inconvenience to a substantial number of the members. The Committee believes it is preferable that the Exchange avoid fixing all odd-lot differentials. The present differentials are not felt subject to criticism. The difference in the differentials is the thing to which objection is taken. Accordingly, the Committee feels that the appropriate action to take is under its power to withdraw its approval of any member acting as odd-lot dealer, Rule 248: 'To withdraw the registration as odd-lot dealer of any member who transacts odd-lot business at differentials less than those at which the odd-lot business of the Exchange is usually transacted.'"

Now, between 1938, the date of that report, and 1951, there are a number of communications in documents which we have offered which show a consistent pattern of consultation between the Exchange and the SEC with respect to the various problems which arose regarding the conduct of the odd-lot business in which the Exchange was acting.

The Exchange was consulting with the Commission and the Commission not once said, "Don't do it."

Then we come to 1951, when there was a feeling, apparently, that an increase in the odd-lot differential was warranted, in view of generally increasing costs. The odd-

lot firms and the Exchange took this matter to the Securities and Exchange Commission.

The Commission considered the matter and it functioned on it, and at a meeting held on January 21, 1951, at the Commission, the minutes of which we have offered this afternoon—there were certain conversations which Mr. Fine read to your Honor from the minutes, but he stopped with a conversation and I'd like to read to your Honor the last paragraph which, after all the conversation gets down to the position. It reads as follows:

"After due consideration the Commission took the position and so advised Mr. Hanrahan"—who is representing the odd-lot firms—"that apart from the jurisdictional question which the Commission was not deciding at this time, the Commission had no objection to the present proposal for an increase in the odd-lot differential and would take no action if the firms of Carlisle and Jacquelin and De Coppet & Doremus should proceed for such increase."

If that isn't regulation, I don't know what regulation is.

And then we come along to 1963, when your Honor recalls the special study made certain recommendations with respect to the odd-lot business.

Very promptly thereafter, as the exhibits we have offered this afternoon show, the Exchange and the Commission together got to work to try to implement those recommendations and together they decided what matters should be encompassed by the Price Waterhouse study.

Together they reviewed the drafts of that study. Together they directed the progress and the direction of that study and eventually that study became the basis for the Commission's direction to the Exchange to make changes in the break point which the Exchange thereupon put into effect.

Now I think this brief capsule of some of the evidence that we have offered this afternoon, your Honor, should be sufficient when supplemented by a review of the documents themselves, and our brief, to convince your Honor that it is the plaintiffs here who don't have an appreciable chance of prevailing and should bear the cost of notice.

The Court: Let me just ask you about that last point, Mr. Jackson.

What really this, in part, comes down to is your client's position that this was a regulated industry and that if we take the period prior to October 1966, it was even sufficiently regulated there so that you would get around the kind of thing discussed by the Supreme Court in the *Silver* case, and so on.

Is that right?

Mr. Jackson: That is right, your Honor, as regards the anti-trust.

The Court: In other words, this really is an immunity situation?

Mr. Jackson: No, I say it is two things. It is immunity—I think if it isn't immunity it certainly is rule of reason, and we think, also, that the same reasoning leads to the conclusion that the Exchange was not derelict in its duty of regulation under the Exchange Act.

The Court: All right.

Mr. Stanton: Might I add a few words? I'll be very short because Mr. Jackson has covered it so admirably.

The Court: Surely.

Mr. Stanton: I would like to mention one or two aspects that are more special to the odd-lot defendants.

Mr. Fine started by alluding to the letter by the Department of Justice to the Securities and Exchange Commission. Of course, we put that in evidence and we do so because however critical it may have been of the odd-lot houses and whether those criticisms are captious or well-founded we think is not a matter to concern your Honor very much.

That letter does recognize that the odd-lot business was at the time of its writing a natural monopoly.

The Department of Justice in that letter reviewed the proposed merger of the two odd-lot firms. It had previously studied the facts relating to that merger and it declined to oppose the merger.

This is much more significant than its remarks about efficiency or inefficiency or its exhortations to the Securities and Exchange Commission. It is a finding of a special exception—perhaps that is over-stating it—to the general application of the anti-trust laws by reason of a natural monopoly, and this, coupled with the close regulation, the close surveillance which the SEC has had on us for years and years renders the steel, tobacco and those cases quite different in their application.

The Court: On that score, I think perhaps Mr. Fine would agree with you. I don't think he is arguing that this is quite like tobacco, steel or any other manufacturing or production field. I think his point is not quite that simplistic. I think all he is saying is that this, to be sure, is an industry which is remarkably different from those and indeed it is *sui generis*, but he can still argue that there is a price-fixing scheme.

Mr. Stanton: If he agrees with me on that leg of my argument, I'll be most grateful.

The second leg is the minutes already referred to by Mr. Jackson of the SEC in 1951, showing approval over

a decade before any time open to Mr. Fine under the statute of limitations of the very differential charge. That, your Honor will note, is an approval given after hearing Mr. Hanrahan speak on behalf of both firms who were then able to survive independently and appeared nevertheless through one counsel speaking by one voice to the SEC.

As an additional authority to those cited by plaintiffs, I would remind your Honor of Judge Medina's opinion in *United States v. Morgan*, where in an attack under the anti-trust laws which the government, which chose not to attack or oppose a merger in this case but did attack in that case—he, Judge Medina, as you remember, discussed in masterful detail the operations of the business and found why it had to be the way it was.

I merely leave those thoughts with you on the question of liability. Strictly speaking, under the anti-trust laws there are other aspects of the case which may puzzle or provoke you.

As a matter of public record, I believe that on the regional exchanges the break point is still 40.

You may wonder why that break point, which the plaintiff here complains is on an exchange still regulated by the SEC, a legal charge today but a source of anti-trust violation and trouble [*sic*] damages to these plaintiffs.

When we turn to the question of imposing costs, I think your Honor must again, as I have, review the findings of fact at the outset of your most recent substantive opinion. These again raise the question whether there is any class at all or simply a wholly and boundlessly imaginary group.

I tremble to raise this now, but the reason I mention it is that the very purpose of a class action is to allow the litigation of small claims.

Now, it is not to make the defendants finance those claims. If the class is allowed to band together to bear

the costs of litigation, so be it. But they are surely then not in a position to say, as Mr. Fine has had the bold candor to say, that Mr. Eisen still stands alone and impecunious, at the mercy of the Court, and therefore to ask us to pay for his communicating with his own client.

These, I think, sum up some of the views that we bring to this hearing.

The Court: All right.

Mr. Holman, do you want to add anything?

Mr. Holman: I have nothing further to add, your Honor, in substance. I would in passing make note of Mr. Fine's comment about \$5 million a year turning on the change in the differential.

I would think that your Honor should observe that the Justice Department in approving the merger had before it the financial situation with respect to this cyclical business and shouldn't be carried into an erroneous conclusion by that \$5 million statement.

We don't accept that view. I didn't go into any great length about it. I didn't think it relevant to this proceeding.

I wouldn't want the record to leave any notions that there was \$5 million involved for these companies.

Each year is different than another year. That was recognized particularly by the Securities and Exchange Commission when it approved the merger of the two odd-lot firms in 1969.

Mr. Fine: If your Honor please, perhaps we can limit the issues. I haven't heard anyone deny that whatever differentials existed and break points existed were agreed upon jointly by the two odd-lot defendants, so that I don't think that fact, which is basic to the price-fixing allegation, is one that is in any controversy.

Perhaps we can therefore agree on that.

With respect to the natural monopoly argument, it is quite clear from Mr. MacLaren's letter that he indicated that this was a natural monopoly. If he indicated that which had gone unregulated in the past and he wanted to be absolutely sure that if it wasn't going to be regulated in the future the Anti-Trust Division ought to know about it, because, "as I said, this issue would be relevant to any exercise of anti-trust jurisdiction in this area."

In other words, he was giving them a chance to do what they had neglected to do in the past, and you don't have a natural monopoly immunity if your monopoly has been achieved by practices that are violative of the anti-trust laws. And, in any event, you had here two firms, a duopoly, which were admittedly agreeing on prices; so that the price-fixing cases would apply.

Of course, the Kaplan case was overruled, I think clearly by *Thill* in the Seventh Circuit.

The Court: What is the gross figure that we computed in that last opinion as to costs for notice? Has anyone got it on the top of your head?

Mr. Holman: I believe it was \$21,000, your Honor.

The Court: That sounds about right here. I've got a copy of this.

Mr. Fine and Mr. Rosenfeld, the plaintiff wouldn't argue that he is unable to put up no money at all, would he?

Mr. Fine: Well, whatever he has to put up is a burden on him. I assume—

The Court: There is no doubt about that. Even if he is a very wealthy man you can say it is some burden. But all I am seeking to find out is whether plaintiff could put up something if it were a token sum.

Mr. Fine: I would think he could put up a token sum, your Honor.

The Court: All right.

Mr. Fine: Although tokens are going up, as I found out, in New York.

The Court: Yes, indeed; they surely are.

Now, I have it laid out at pages 41 and 42. Inflation may have eroded some of the figures here. I don't get \$21,000. I think it is less than that, isn't it?

Mr. Holman: That was my recollection. We had computed it after your decision. I could be wrong in that recollection, your Honor.

The Court: All this proves is that lawyers and judges are lousy mathematicians. I guess we will just have to pass that.

Mr. Stanton: Perhaps we should answer Mr. Fine's suggestion that there was an agreement on the differential. We, of course, can't accept his statement in that respect.

The documents which you have before you show a most intense negotiation between the odd-lot houses among themselves, with the Exchange, with the regional exchanges, representatives of the various out-of-town offices and, of course, the Securities and Exchange Commission at many levels and at many times before the resulting differential is arrived at.

The Court: I will look, then, to receiving your written submissions on the 18th, which is a week from this coming Friday and, as I said, if someone wants to respond briefly to something that the other side has said, he can call my chambers and we will try to work out something in short order.

I would hope that wouldn't be necessary, but I don't want to say no to that now.

All right, off the record.

(Discussion off the record.)

**OPINION OF TYLER, J., DATED APRIL 4, 1972
PROVIDING THAT DEFENDANT SHALL BEAR
90% OF COSTS OF NOTICE TO CLASS.**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

[SAME TITLE]

TYLER, District Judge:

This case is currently on remand from the Court of Appeals for class action determination. In deciding whether this case could be maintained as a class action, this court was directed to consider “* * * questions of notice, adequate representation, effective administration of the action, and any other matters which the District Court may consider pertinent and proper.” *Eisen v. Carlisle & Jacquelin*, 391 F. 2d 555, 570 (2d Cir., 1968). After able response by the parties to these and other issues, it was decided that this case could and should be maintained as a class action. *Eisen v. Carlisle & Jacquelin*, 52 F. R. D. 253 (S. D. N. Y., 1971); at the same time, however, decision on the issue of the allocation of the costs of notice of that status to the class was reserved. Specifically, in recognition of the fact that cost of notice as required might impose unfair burdens upon either plaintiff or defendants, it was decided to hold a preliminary hearing on the merits to determine whether, and, if so, how such costs might be allocated among the parties. In this preliminary hearing, the parties were afforded the opportunity to present evidence showing “* * * ‘the likelihood that one party or the other would prevail at trial’ * * *” *Dolgow v. Anderson*, 43 F. R. D. 472, 502 (E. D. N. Y. 1968). If, after the hear-

ing, the evidence showed that the "... chances of ultimate success of plaintiff and the class were sustained", *Dolgow v. Anderson*, 438 F. 2d 825, 827 (2d Cir., 1971), defendants would be required to pay all or part of the costs of notice. *Eisen v. Carlisle & Jacquelin*, *supra*, 52 F. R. D. at 272.

The "mini-hearing", as this preliminary hearing has come to be termed, was held on February 9, 1972. No oral testimony was taken, the parties preferring instead to rely on submission of voluminous documentary evidence. Argument by counsel was heard, and briefs were submitted thereafter. There follow findings of fact and conclusions of law concerning plaintiff's anti-trust and "failure to regulate" claims which are based on evidence currently before this court. They may be considered binding on the parties and court only for the stated purpose of the hearing; the allocation of the cost of notice. Thus, they may not be considered to prejudice any party's right to introduce more evidence and proffer further argument when the merits are reached for final determination.¹

Briefly stated, plaintiff asserts that he and the class were injured by various anti-competitive practices of defendants. Specifically, plaintiff complains that in establishing differentials to be added to the price of odd-lot stock traded over the New York and other exchanges, defendants were guilty of *per se* violations of the antitrust laws. Plaintiff further complains that the class was injured by the New York Stock Exchange's alleged failure to regulate odd-lot transactions as it is required to do by the terms of the Securities Exchange Act of 1934 ("the Act").

On the basis of the evidence presently before the court, I conclude that plaintiff class is more than likely to prevail

1. Plaintiff's counsel have argued that the merits of this case can be reached on motions for summary judgment—and that the present record before the court is complete for such resolution. Even if this be true, this court declines, as stated in the text, to treat this case on the merits at this juncture.

on both of these claims and that defendants must therefore bear the major share (90%) of the cost of notice to the class.

FINDINGS OF FACT

1. The defendant odd-lot firms, Carlisle & Jacquelin and DeCoppet & Doremus (the "odd-lot defendants"), during the years 1960 to 1966 enjoyed a monopoly of odd-lot transactions over the New York Stock Exchange ("the Exchange").

2. Prior to the enactment of the Act, the differentials charged by odd-lot firms operating over the Exchange were set by agreements among the firms themselves with the approval of the Board of Governors of the Exchange. This procedure was not essentially changed after the enactment of the Act until 1966 when the Exchange adopted a rule establishing odd-lot differentials.

3. The Exchange in 1934 filed a registration statement with the Securities and Exchange Commission. In that document and in annual amendments filed with respect thereto, the Exchange described its regulation of odd-lot firms as follows:

"Transactions in odd-lots are effected on this Exchange under methods which have been prescribed by the odd-lot brokers and dealers with the *acquiescence* of the Exchange." (emphasis supplied)

4. Prior to 1964, the Exchange had adopted five rules pertaining to odd-lot transactions. None of these rules in any way pertained to or sought to regulate the differentials to be charged in odd-lot transactions. These five rules, which can only be said to apply to peripheral matters, constituted the only formal regulation of odd-lot brokers and dealers by the Exchange.

5. Prior to its adoption of Exchange Rule #125 in 1964, the Exchange was the only national exchange not to have established rules regulating odd-lot differentials.

6. In 1938, in addition to the two odd-lot defendants, four smaller specialist firms were also transacting odd-lot business on the Exchange. These smaller firms, which at that time accounted for $2\frac{1}{2}\%$ of all odd-lot business on the Exchange, had adopted the practice of absorbing transfer taxes in their odd-lot sales. The odd-lot defendants, who chose not to absorb these costs, complained of these competitive practices to the Exchange's Committee on Floor Practice. After confidential hearings, the Committee decided:

"* * * that the differentials at which odd-lot dealers do business should be the same. The Committee believes that price competition between odd-lot dealers is detrimental to the best interests of the Exchange and a cause of embarrassment and inconvenience to a substantial number of members."

The Committee then decided that henceforth it would be the policy of the Exchange to "* * * withdraw the registration as odd-lot dealer of any member who transacts odd-lot business at differentials less than those at which the odd-lot business of the Exchange is usually transacted." The effect of this determination, not surprisingly, was that the smaller odd-lot firms were forced to charge the same differential as the odd-lot defendants.

7. The 1938 Committee report, hearings, and the policy generated thereby were never disclosed to the public. Indeed, the Commission, which was not notified by amendment to the Exchange's registration statement or by any

other official means, apparently first became aware of this policy during the course of its Special Study investigations.

8. While there has been no price competition between odd-lot firms since 1938, the firms have competed in terms of services provided for commission houses. The benefits of these services, which include interest free loans and market information, enure to the commission houses rather than to investors. On the other hand, the differentials, which are not paid by commission firms, affect only the investing public.

9. The 1938 Committee policy or "ruling" had a devastating effect upon the smaller odd-lot firms which did not have the resources to compete with the odd-lot defendants in services and thus were dependent upon some sort of price competition in order to attract and maintain business. The Exchange policy, which foreclosed price competition, insured the ultimate demise of the smaller odd-lot firms.

10. In 1941, the odd-lot dealers decided to increase the differential on stock selling below \$1.00. Upon receipt of notice of this increase from the Exchange, the Commission inquired as to whether public disclosure of the new differential would be announced to the public. In response to this query the Exchange replied as follows:

"The Exchange has not had, nor does it now have, any rules fixing the differential at which odd-lot dealers in 100 share unit stocks should deal, since this has been and is regarded solely as a matter between the odd-lot dealers and the commission houses with which they deal. Therefore, it is felt that it would be inappropriate for the Exchange to take any action with respect to either approving or disapproving the present proposed change."

11. In 1950, the Commission's then Director of the Division of Trading and Exchanges wrote the Exchange: "[W]e feel that the Exchange should consider the advisability of adopting rules, regulations, or interpretations reduced to writing which would govern the existing operational methods" of the odd-lot dealers. The Exchange replied that it was reluctant to do so and the matter was dropped until the Exchange adopted Rule 125 at the Commission's request in 1964.

12. Prior to July, 1951, odd-lot firms charged a differential of $\frac{1}{8}$ point on all stock selling for more than \$1.00. In 1947, the odd-lot defendants began discussing the feasibility of increasing the differential. By December, 1950, the odd-lot defendants had agreed between themselves to increase the differential to $\frac{1}{4}$ point on all shares selling for more than \$60.00. The proposed \$60.00 breakpoint was informally presented by the odd-lot defendants to the Exchange, but was not mentioned to the other firms also engaged in odd-lot transactions over the Exchange. The Exchange disclaimed jurisdiction over the proposed differential increase but informally expressed the opinion that it had no objection to its implementation. Thereupon, the odd-lot defendants decided to seek approval of their proposed increase of differentials from the Commission. Accordingly, they jointly hired counsel who presented their case to the Commission. While doubting that it had jurisdiction, the Commission stated that it had no objection to implementation of the new differentials.

13. The odd-lot defendants, realizing that they would lose business if odd-lot firms on other exchanges continued to charge a lower differential, sought to have the other exchanges raise their differentials to accord with their own. The odd-lot defendants turned first to the Midwest Ex-

change ("Midwest"), which had been considering conversion to a decimal differential system which, in some cases, would have offered cheaper rates to investors. Midwest, which had its own reasons for wanting a decimal system, at first refused to accept the differentials proposed by the odd-lot defendants. After protracted and fruitless negotiations, the odd-lot defendants told Midwest that they would be willing to drop the breakpoint below \$60.00 but, if Midwest did not come to terms, they would increase their differential only on stock not traded over regional exchanges—thereby increasing their profits without conferring benefit upon members of Midwest and other regional exchanges. Midwest capitulated and agreed with the odd-lot defendants to accept a breakpoint of \$40.00.

14. As a part of their agreement, Midwest undertook to insure that all of the western exchanges would agree to charge the new differential with the \$40.00 breakpoint. The odd-lot defendants agreed to see to it that the eastern exchanges did likewise. The president of Midwest also sought Commission approval for the new rates to be charged on all exchanges. On July 16, 1951, the Commission advised that it would not object to a \$40.00 breakpoint.

15. Of all the regional exchanges approached by Midwest and the odd-lot defendants, only the Boston Exchange ("Boston") refused to raise its differentials. Boston's members reasoned that if their odd-lot differentials were lower, they might expect additional odd-lot business to come their way. Accordingly, on July 9, 1951, the Boston odd-lot traders unanimously resolved that they would not increase their differentials

16. The present of the Boston Exchange informed the Exchange that Boston would not advertise its lower differential in order to increase its odd-lot business. Boston's

president has testified on another occasion that he made this promise in fear of retaliation from the Exchange. This concern stemmed in part from the Exchange's threat in 1940 to restrict the use of its members' funds in odd-lot transactions on other exchanges. Furthermore, many of Boston's members relied upon the Exchange for financing, up to date price quotations and the clearing facilities of various dual memberships.

17. On the regional exchanges, odd-lot transactions are handled by stock specialists instead of specialized odd-lot firms as they are on the Exchange. Odd-lot business is very important to these regional specialists and to the exchanges on which they operate. For example, while odd-lot transactions accounted for about 10% of the Exchange's business, they approximated 48% of Boston's share volume.

18. On July 20, 1951 representatives of the odd-lot defendants and the Exchange met to discuss notice of the increased differentials. At this meeting, the Exchange disassociated itself from the release, but agreed to respond to public inquiry concerning the increase. In order to be able to answer such questions, the Exchange, which therefore apparently had neither sought nor received any data to support the new differentials, requested that the odd-lot defendants furnish information in support of the increase at that late date.

19. Shortly before the increase was publicly announced, the then existing smaller odd-lot firms trading over the Exchange were informed for the first time of the raised differentials and asked to sign the announcement. One such firm refused to sign, but, fearful that it would be suspended in accordance with the 1938 Committee policy, went along and charged the increased differential.

20. On July 25, 1951, the odd-lot firms issued a release addressed to member firms of the Exchange announcing that they were going to charge new differentials. This release apparently invited no public discussion and none ensued, perhaps because the release was virtually simultaneous with the effective date of the increase.²

21. In August, 1951, the Boston Exchange, despite its ban on advertising, began to experience an increase in odd-lot business. This created some dissension in the Boston ranks. Some of the Boston dealers, particularly the smaller ones, began to urge advertisement of the lower differentials in effect on their exchange in order to increase business. The larger Boston brokers, who had dual memberships and were more sensitive to pressure from the Exchange, advocated that Boston's differential be raised to correspond with that charged elsewhere.

22. In October, 1951, the Boston Governing Committee polled its members to see whether Boston should also raise its differentials. The result of the poll was 42 to 41 in favor of retention of the $\frac{1}{8}$ point differential. Nevertheless, Boston raised its rates shortly thereafter, claiming that the dealers who had voted for the higher differential, although numerically a minority, actually conducted 75% of the odd-lot business.

23. In 1956, the Exchange engaged Ebasco Services, Inc. to study Exchange methods and make proposals for their modernization. In due course, Ebasco studied odd-lots and made proposals for modernization of odd-lot pro-

2. Nowhere in the evidence before me do I find the full text of the July 25, 1951 release or the effective date of the new differentials. I infer, however, from the *SEC Special Study* and the portion of the release contained therein, that notice of the new differentials and the implementation thereof were nearly, if not actually, simultaneous. *SEC, Report of Special Study of Securities Markets*, H. R. Doc. No. 95, Pt. 2 at 183 (1963).

cedures. The odd-lot defendants, fearing a decrease of the differential among other things, opposed the Ebasco proposals and succeeded in defeating implementation thereof. Although the differentials were reduced in 1966, the Ebasco proposals, which would have substantially cut the costs of odd-lot transactions, remain unconsidered and unimplemented.

CONCLUSIONS OF ULTIMATE FACT AND LAW

1. The odd-lot defendants fixed the differentials or prices, to be charged in odd-lot transactions over the Exchange. These rates which were fixed in 1951 were in effect until 1966.

2. The odd-lot defendants fixed the differentials to be charged on other exchanges in 1951. These differentials were also in effect in the early 1960's.

3. The Exchange was an active participant in these price fixing arrangements. This participation took the form of failure to regulate, acquiescence in the increase, and maintenance of its 1938 policy of enforcing the odd-lot defendants' rates upon others.

4. Plaintiff and the class have established that they may likely carry their burden of producing evidence that the defendants fixed prices. Under the *per se* rule, once this showing has been made, judgment must follow and the court need not consider any defenses such as the reasonableness of the price formula or the fact that the public has not been harmed. *United States v. National Association of Real Estate Boards*, 339 U. S. 485 (1950); *U. S. v. Trenton Potteries*, 273 U. S. 392 (1927).

5. Defendants urge this court to apply the rule of reason, which " * * * permits the courts to decide whether conduct is significantly and unreasonably anti-competitive

in character and effect." *Report of The Attorney General's National Committee To Study the Antitrust Laws*, 11 (1955). The rule is not, however, unlimited in scope and will operate to excuse only conduct that can be shown to be incidental or ancillary to competition. See, e.g. *Appalachian Coals, Inc. v. United States*, 288 U. S. 344 (1933). The rule of reason almost certainly is inapplicable to this case, however, since price fixing agreements are conclusively presumed anti-competitive in both purpose and effect. See *United States v. Trenton Potteries, Co.*, *supra* at 396-398. "In such cases, inquiry under the Rule of Reason is over once it has been decided that the conspiracy or agreement under review in fact constitutes price rigging * * *" *Report of the Attorney General, supra* at 11.

Defendants also argue that application of the rule of reason to an allegedly analogous situation in *United States v. Morgan*, 118 F. Supp. 621, 688-691 (S. D. N. Y. 1953) indicates that it should pertain here. In *Morgan*, however, Judge Medina found that the restraints there at issue affected neither competitors nor market prices. *Ibid.*, 118 F. Supp. at 689. Because the facts here tend to show that competitors and market prices were directly affected, *Morgan* may be said to stand for the proposition that the rule of reason should be applied to this case.

6. The defendants also claim that they are immune from anti-trust liability as theirs is a regulated industry. Specifically, defendants argue that insofar as the Exchange is vested with self-regulatory powers, its approval of the differentials protects both it and the odd-lot defendants from anti-trust scrutiny. While *Silver v. New York Stock Exchange*, 373 U. S. 341 (1963), which held that self-regulatory acts by the Exchange are exempt from antitrust laws only to the extent necessary to effectuate the purposes of the Exchange Act, might be read to refute this

claim without more, defendants strike two separately stated arguments off the *Silver* analysis. First, they urge that because the effect of self-regulatory acts must be investigated to ascertain whether they are necessary to fulfill the commands of the Act, it follows that the *per se* rule cannot be applied at all. This view, as defendants see it, is supported by *Kaplan v. Lehman Bros.*, 250 F. Supp. 562 (N. D. Ill., 1966), *aff'd*, 371 F. 2d 409 (7th Cir.), *cert. den.* 389 U. S. 954 (1967). Second, it is urged that the violation here complained of, the fixing of odd-lot differentials, is mandated by and necessary to implement the Act.

In my view, these two arguments are logically one—and the latter statement of that one argument is the better articulation. In other words, the question of whether or not the *per se* rule is applicable, see discussion *supra*, is a separate question from that of whether or not the Exchange's regulatory approval of fixed differentials was within the purview of the Act and necessary to its implementation. On the other hand, if defendants are correct that fixing of the differentials with Exchange approval was proper and necessary to implement the Act, they presumably would have a complete defense to this action. For reasons to be hereinafter summarized, it is doubtful that such a defense can be sustained. Certainly, regulation of odd-lot differentials is within the scope of, mandated by and necessary to the implementation of the purposes and intent of the Act. See 15 U. S. C. §§ 78 and 78s. Further, if the Exchange had exercised its self-regulatory powers by establishing rules in respect to odd-lot differentials, I would assume *arguendo* that review of such rules might be beyond the powers of this court. But the Exchange, by its own admission, failed to establish any rules or regulations with regard to odd-lot differentials. To put the matter bluntly, it is unlikely that this failure or "benign acquiescence"

can be considered to constitute regulation mandated by the Act. Even if it could be so considered, such "regulation" scarcely would be immunized from judicial review. To illustrate, defendants may have failed to consider that when the Exchange exercises its self-regulatory powers, it owes at least its members, if not others, certain procedural safeguards such as notice and the opportunity to be heard. In its "regulation" of odd-lot differentials, the Exchange provided notice to no one and afforded only the odd-lot defendants an opportunity to be heard. Therefore, plaintiff and the class have a powerful claim that " * * * the Exchange has plainly exceeded the scope of its authority under the Securities Exchange Act to engage in self-regulation and therefore has not even reached the threshold of justification under that statute for what would otherwise be an antitrust violation." *Silver, supra*, 373 U. S. at 365.

7. Defendants next argue that the Commission's approval rendered the differentials the "legal" rate and that thus they cannot be held liable, even though that rate was initially fixed in violation of the antitrust laws. *Keogh v. Chicago & Northwestern Railroad Co.*, 260 U. S. 156 (1922). It is at least questionable whether the Commission, while doubting its jurisdiction to do so, could grant administrative approval in the sense to which *Keogh* refers. This argument need not be reached, however, since *Keogh* and its progeny are to be applied only " * * * in cases of plain repugnancy between the antitrust and regulatory provisions." *United States v. Philadelphia Nat. Bank*, 374 U. S. 321, 351 (1963). Insofar as *Silver, supra*, has made it clear that a "plain repugnancy" does not exist between the Act and the antitrust laws, the *Keogh* doctrine is of no applicability here.

8. Finally, defendants claim that plaintiff and the class are barred from seeking damages since they failed to com-

plain of the differentials to the Commission under the provisions of the Administrative Procedure Act, 5 U. S. C. § 8551 *et seq.* While this argument might have some force if that agency could provide the relief here sought, the Commission is clearly powerless to do so. Although the Commission can consider antitrust matters, as can any other regulatory agency, see *The Rules of the New York Stock Exchange*, 10 S. E. C. 270 (1941), it does not have primary jurisdiction thereof. *Thill Securities Corp. v. New York Stock Exchange*, 433 F. 2d 264, 272 (7th Cir., 1970). Furthermore, the Exchange, which could not be an "aggrieved person", has no standing to commence antitrust suits, see *Hawaii v. Standard Oil of California*, No. 70-49 (U. S. Supreme Court, March 1, 1972), and, of course, could not entertain a class suit or award damages. Indeed, the Commission has done all that it could do by requiring the Exchange to establish the Rule which lowered the differential in 1966. To now bar plaintiff from seeking recovery of damages incurred prior to 1966 would be unjust and would needlessly sacrifice " . . . the benefits of competition acknowledged by Congress." *United States v. Third National Bank in Nashville*, 390 U. S. 171, 189 (1968).

9. Concerning plaintiff's claim against the Exchange for failure to regulate, the Exchange may well be liable to plaintiff and the class for a violation of its statutory duty to regulate its members, provided that (1) damage can be shown, *Baird v. Franklin*, 141 F. 2d 238 (2d Cir.) *cert. den.* 323 U. S. 737 (1944), and (2) there is proof that the Exchange either knew or had reason to know that its rules were being violated. *Pettit v. American Stock Exchange*, 217 F. Supp. 21, 29-30 (S. D. N. Y., 1963). It has recently been held that the Exchange may also be civilly liable for a failure to regulate its membership under a third party

beneficiary theory. *Weinberger v. New York Stock Exchange*, 335 F. Supp. 139, 144 (S. D. N. Y., 1971).

Defendant Exchange acknowledges these cases but asserts that they are distinguishable as they all concern the failure of the Exchange to adhere to its own rules and not the failure to create rules. This is likely to be a distinction without a difference. Moreover, the argument ignores the fact that the duty to regulate springs from the Act and not from any rule the Exchange might adopt thereunder. At the very least, the Exchange is under a " * * * twofold duty * * * of enacting certain rules and regulations and of seeing that they are enforced." *Baird v. Franklin, supra*, 141 F. 2d at 244.

Plaintiff has excellent evidence that the Exchange has not satisfied either of these duties. As has been repeatedly stated herein, no rules concerning odd-lot differentials were enacted or approved by the Exchange, notwithstanding the rather plain requirements of Sections 6 and 19 of the Act. 15 U. S. C. § 78f and § 78s. The "practices" which the Exchange claims satisfied its duties with regard to the differentials could be interpreted as no more than complicity in the price fixing schemes of the odd-lot defendants or an example of the Exchange's " * * * inability or unwillingness to curb abuses * * *" *Silver, supra* at 351. In sum, plaintiff and the class have a strong case that the Exchange acquiesced to increased differentials with at least constructive knowledge that resulting increased costs to the investing public would benefit only a select few of its members—i.e. that the Exchange condoned one of the very abuses which the Act was passed to curb.

ALLOCATION OF COST OF NOTICE

On the basis of the foregoing, it appears that plaintiff and the class he represents are more than likely to prevail

at trial or upon a motion for summary judgment. Rule 56, F. R. Civ. P. I conclude, therefore, that defendants should bear 90% of the costs of Rule 23(c)(2), F. R. Civ. P. notice to the class. Of defendants' share, one-half should be borne by the Exchange and one-half by the odd-lot defendants. The remaining 10%, which represents the "hazards of litigation", must be put up by plaintiff.

It is so ordered.

Dated: April 4, 1972

H. R. TYLER, JR.
U. S. D. J.

**NOTICE OF MOTION TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT
DATED APRIL 11, 1972, TO FIX A BRIEFING
SCHEDULE AND DATE FOR ORAL ARGUMENT.**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the affidavit of William E. Jackson, sworn to April 11, 1972, the decision, opinion and order of this Court dated March 8, 1968, retaining jurisdiction herein, and the decisions, opinions and orders of the District Court herein dated April 7, 1971 and April 4, 1972, and all prior proceedings, the undersigned will move this Court at a time and date to be designated by the panel that will hear the motion, for an order pursuant to this Court's aforesaid decision fixing a briefing schedule and date for oral argument for the purpose of reviewing and correcting, in light of this Court's aforesaid decision, the District Court's proceedings and determinations on remand herein concerning the maintenance of this action as a class action, and for such other and further relief as to the Court may seem just and proper.

Dated: New York, N. Y.

April 11, 1972

Yours, etc.,

Carter, Ledyard & Milburn, Esqs.

2 Wall Street

New York, N. Y. 10005

Attorneys for appellee

Carlisle & Jacquelin

Notice of Motion

Kelley Drye Warren Clark Carr
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350 Park Avenue

New York, N. Y. 10022

Attorneys for appellee

DeCoppet & Doremus

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McCloy, Esqs.

By WILLIAM E. JACKSON

William E. Jackson

(A member of the firm)

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New York, N. Y. 10005

Attorneys for appellee

New York Stock Exchange, Inc.

To:

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New York, N. Y. 10007

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Philadelphia, Pa. 19103

Attorneys for appellant

**AFFIDAVIT OF WILLIAM E. JACKSON IN
SUPPORT OF MOTION.**

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

[SAME TITLE]

State of New York)
County of New York) ss.:

WILLIAM E. JACKSON, being duly sworn, deposes and says:

I am a member of the firm of Milbank, Tweed, Hadley & McCloy, attorneys for appellee New York Stock Exchange, Inc., and make this affidavit in support of appellees' motion pursuant to this Court's opinion of March 8, 1968, retaining jurisdiction herein, to set a briefing schedule and date for oral argument for the purpose of reviewing and correcting, in the light of this Court's aforesaid decision, the District Court's proceedings and determinations on remand herein concerning the maintenance of this action as a class action.

Prior Proceedings

This action was commenced on May 2, 1966. The complaint alleges that the action is a class action on behalf of all purchasers and sellers of odd-lots on the New York Stock Exchange. The action is brought against Carlisle & Jacquelin and DeCoppet & Doremus for allegedly fixing the odd-lot differential in violation of Sections 1 and 2 of the Sherman Act and against the Exchange for allegedly failing adequately to regulate in violation of Section 6 of the Securities Exchange Act of 1934. Upon motion by defendants, the District Court (Tyler, J.) by decision and opinion

dated September 27, 1966, (41 F. R. D. 147) dismissed the action as a class action because (a) plaintiff had failed to demonstrate that he would be able fairly and adequately to protect the interests of the class; (b) the notice required by the Due Process Clause and Rule 23(c)(2), Federal Rules of Civil Procedure, could not be given; and (c) questions common to the class did not predominate over questions affecting individual members.

Plaintiff appealed from the District Court's decision and defendants moved to dismiss the appeal on the ground that the order appealed from was not final. This Court (Waterman, Moore and Kaufman, Circuit Judges, per Kaufman, J.) by decision and opinion dated December 19, 1966, held that the denial of class action status was appealable as a final order under 28 U. S. C. § 1291 because it constituted the "death knell" of the action. 370 F. 2d 119 (2d Cir. 1966), *cert. denied*, 386 U. S. 1035 (1967). Cf. *Hackett v. General Host Corp.*, CCH Trade Reg. Rep. ¶73,800 (3 Cir. 1972).

The appeal was then heard on the propriety of the District Court's dismissal of the action as a class action. By opinion dated March 8, 1968, this Court (Medina and Hayes [*sic*], Circuit Judges, per Medina, J.) reversed, articulated a number of principles in regard to facts of this case then in the record, expressly retained jurisdiction and remanded to the District Court for an evidentiary hearing to determine further facts consistent with this Court's opinion. This Court stated:

"Accordingly, the order appealed from is reversed; we retain jurisdiction, and the case is remanded for a prompt and expeditious evidentiary hearing, with or without discovery proceedings, on the question of notice, adequate representation, effective

administration of the action and any other matters which the District Court may consider pertinent and proper." (391 F. 2d at p. 570)

Chief Judge Lumbard filed a dissenting opinion in which he stated, among other things:

"The appropriate action for this Court is to affirm the district court and put an end to this Frankenstein monster posing as a class action." (391 F. 2d at p. 572).

Thereafter, the parties sought to determine the facts called for by this Court's opinion. Many of the facts were stipulated and an evidentiary hearing was held on April 30, 1970. By opinion and order dated October 8, 1970, the District Court (Tyler, J.), called for further information consistent with this Court's opinion. That information was supplied.

By opinion and order dated April 7, 1971, (52 F. R. D. 253), the District Court (Tyler, J.) made certain findings of fact (pp. 256-260) in response to the remand of this Court. In addition, we submit, as hereinafter set forth, the District Court went beyond the mandate of this Court to find facts (391 F. 2d at p. 570) by writing a new opinion directly contrary to its initial decision, holding that the action could be maintained as a class action, and expounding extraordinary notice and damage theories (pp. 260-272). This opinion of the District Court exercises the decision-making function that this Court reserved to itself when it retained jurisdiction, and is squarely at odds with many of the principles articulated by this Court in its opinion remanding the case.

One such principle contravened by the District Court is that the cost of supplying the notice required by Rule 23

(c) (2) and the Due Process Clause must rest upon the representative party when he is the plaintiff (391 F. 2d at 568). The District Court held that the question of who pays for the notice was an open one to be determined only after a preliminary hearing on the merits and intimated that the cost of notice could be allocated between plaintiff and defendants on the basis of which side makes the stronger showing in the preliminary hearing on the merits (pp. 270-272).

Upon being informed of defendants' intention to seek immediate review because of their belief that such a preliminary hearing would be based on principles contrary to those contained in the opinion of this Court, as well as highly prejudicial, burdensome and unnecessary, Judge Tyler agreed to stay the preliminary hearing pending application to this Court, on the condition that defendants make clear to this Court that he thought such a preliminary hearing should precede review. (Tr. of conference with Court, May 17, 1971, pp. 11-12)

By notice of motion dated May 21, 1971, defendants moved this Court for an order fixing a briefing schedule and date for oral argument of the issues raised by this Court's decision of March 8, 1968 in the light of the facts found by the District Court in its April 7, 1971 decision. Pursuant to Judge Tyler's request, the moving papers informed the Court of his view that review by this Court was then premature, and should not take place until after the District Court's preliminary hearing on the merits. The motion was denied by order of this Court dated June 10, 1971 (Medina, Lombard and Hays, Circuit Judges).

The preliminary hearing was held before the District Court on February 9, 1972. By opinion and order dated April 4, 1972 (copy attached hereto), the District Court determined that the merits of the case showed that plaintiff was more than likely to prevail at trial or upon a motion for

summary judgment to such an extent that defendants should bear 90% of the costs of the Rule 23(c)(2) notice to the class and that the remaining 10% should be borne by plaintiff as "the hazards of litigation". This cost had been computed to be "approximately \$21,720.00" in the Court's opinion of April 7, 1971. (52 F. R. D. at p. 263). Thus, the effect of the District Court's ruling is to force defendants to pay over approximately \$19,530 to finance a litigation against themselves, which, in view of plaintiff's oft asserted limited means, will be unrecoverable should defendants prevail upon the merits. See *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949).

*The District Court's Two Opinions Are Directly
Contrary to the Decision of this Court*

The instant motion is brought on because in reaching its various conclusions, the District Court not only exceeded this Court's mandate of March 1968, but so far departed from all accepted and usual norms of judicial procedure as to infringe seriously upon the procedural and constitutional rights of defendants and the alleged class members. This is manifested not only in the District Court's about-face ruling that this action may after all be maintained as a class action, but in its unprecedented use of a "fluid class recovery" concept which would result in antitrust damages being awarded to a group that has never claimed to be injured and in fact has not been injured. It is also manifested in the District Court's failure to require individual notice except to a small segment of the 2,250,000 identified class members, and in its decision to prejudge the merits, which has resulted in imposition of 90% of the (irrecoverable) cost of giving notice (\$19,530) on defendants.

A. Limited Scope of the Remand. This case was the initial class action decision in this Circuit under amended

Rule 23, which became effective on July 1, 1966. Consequently, this Court's opinion on the class action questions constituted the first and leading decision of a Court of Appeals on the principles to be applied to a class action determination. This Court's opinion has been cited in practically every subsequent class action decision. The principles articulated by the Court have played a role in fashioning the decisions of each succeeding court. This Court's opinion makes clear that quite properly it reserved to itself the task of further fashioning this important body of law consistent with the basic principles articulated in its decision after the requested facts were reported by the District Court. In no way did this Court suggest that it relinquished any jurisdiction to the District Court other than to find the requested facts through an evidentiary hearing.

Nevertheless, the District Court's decisions attempt to supersede the decision of this Court and pre-empt the decision-making function which this Court reserved to itself. In so doing, the District Court ignored many of the principles established by this Court and followed subsequently by many other courts, and did so, at one point (52 F. R. D. at p. 269), by citing a subsequent decision of this Court, *Green v. Wolf Corp.*, 406 F. 2d 291, 301, N. 15 (2d Cir. 1968), which, however, in no way changed the unequivocal holding of this Court in this case. For these reasons, prompt review and setting aright the decisions of the District Court are imperative.

B. *The District Court's Notice Program.* In his initial opinion, Judge Tyler correctly held that "both the Rule and concepts of due process require individual notice for the class members who can be identified". 41 F. R. D. 151. Similarly, this Court found that:

"Notice, as an integral part of due process must be 'reasonably calculated, under all the circum-

stances, to apprise interested parties of the pendency of the action and afford them an opportunity to present other objections'."

* * *

"The task of furnishing notice to the class members in such a case as this must rest upon the representative party when he is the plaintiff." (391 F. 2d at p. 568)

* * *

"* * * we assume that some sort of ritualistic notice in small print on the back pages of a newspaper would in no event suffice." (391 F. 2d at p. 569).

* * *

"If the Court finds that a considerable number of members of the class can be identified with reasonable effort, and financial considerations prevent the plaintiff from furnishing individual notice to these members, there may prove to be no alternative other than dismissal of the class suit." (391 F. 2d at p. 570)

Yet, despite its finding that 2,250,000 of the class members can be identified by simply running computer tapes (Findings of fact 5, 9, 10; 52 F. R. D. at pp. 257-258), the District Court has outlined a notice program in which individual notice would be sent only to 2,000 class members who had 10 or more odd-lot transactions plus 5,000 additional class members selected at random, and a $\frac{1}{4}$ page notice would be published in four newspapers (52 F. R. D. at pp. 267-268). Thus, despite the fact that the names and addresses of 2,250,000 class members can be identified, less than $\frac{1}{2}$ of 1% of those class members will receive the individual notice mandated by Rule 23 and the Due Process Clause. Furthermore, rather than assigning the task of furnishing notice to plaintiff, Judge Tyler has decreed

that this task, in the proportion of 90% and to the extent of \$19,530, unrecoverable, rests upon defendants. In a case such as this, which is not a shareholder's derivative suit, forcing defendants to finance a lawsuit against themselves, a lawsuit which can be of no possible benefit to them, is a clear denial of due process. See *Cusick v. N. V. Nederlandsche Combinatie Voor Chemische Industrie*, 317 F. Supp. 1022, 1025 (E. D. Pa. 1970).

C. The District Court's theory of a recovery for in futuro odd-lot purchasers is contrary to the principles of this Court's opinion, the antitrust laws, and the remedy articulated by this Court for the Exchange Act violation alleged. The decision of this Court never contemplated any recovery other than that of money damages for members of the class who had allegedly been injured.

"On the other hand, courts in the past have been able to fashion procedures in order to deal with the distribution of millions of dollars in damages to thousands of small claimants."

• • •

"Moreover, in the present case there is no public administrative body that could insure repayment, so the responsibility must ultimately rest on the judicial system." (391 F. 2d at 567)

In fact, money damages for those proving injury is the only relief possible under Section 4 of the Clayton Act (15 U. S. C. § 15), which provides that "any person who shall be injured in *his* business or property shall recover three-fold the damages *by him sustained* * * *" (emphasis added). It is also the remedy for violation of Section 6 of the Exchange Act. See *Baird v. Franklin*, 141 F. 2d 238 (2d Cir.), *cert. denied*, 323 U. S. 737 (1944). This action

is brought under both statutory provisions (Complaint ¶¶ 2; 21).

Judge Tyler (52 F. R. D. at pp. 264-265), however, adopts the position advanced in midstream by plaintiff when confronted by the vast manageability problems of this action as a class action: that recovery need not be for the benefit of class members for redress of whose injuries the action was commenced, but could, in order to meet the manageability requirement of Rule 23, consist of a future adjustment of the odd-lot differential to benefit future odd-lot traders and to penalize defendants. Judge Tyler calls this remarkable invention, which constitutes an abandonment by plaintiff of the class claimed to be represented, a "fluid class recovery" (p. 264). There is no support for such a departure from Rule 23, the unmistakably clear language of the Clayton Act, or this Court's interpretation of the Exchange Act. In fact, the Supreme Court has held that Rule 23 does not and cannot alter requirements of substantive law. *Snyder v. Harris*, 394 U. S. 332, 336 (1969). See also Handler, Twenty-Fourth Annual Review, "Fluid Classes and Wealth Distribution" 26 Record of the Association of the Bar of the City of N. Y., 753, 770-775 (December 1971).

There is in the record in this case no showing whatsoever that all or even some odd-lot customers during the years of 1962-1966 will or even may be odd-lot customers after the ultimate decision in this case. (Compare 52 F. R. D. at p. 265). See *City of Philadelphia v. American Oil Company*, 53 F. R. D. 45, 72-73 (D. N. J. 1971) Judge Tyler furthermore glosses over (p. 265) the fact that the rate of commission as to odd-lot trading is within the exclusive jurisdiction of the Securities and Exchange Commission under Sections 19(b)(9) and (11) of the Exchange Act (15 U. S. C. § 78(s)(b)(9, 11), subject only to judicial

review by the appropriate United States Court of Appeals under Section 25(a) of that Act (15 U. S. C. § 78y).

D. The preliminary hearing violated the Fifth and Seventh Amendments and has resulted in misapplication of the substantive law. As a result of the preliminary hearing, the District Court concluded that the odd-lot defendants had fixed the differential in 1951 and that the Exchange was an active participant through its failure to regulate. Ruling that plaintiff was more than likely to prevail, the District Court then ordered defendants to pay 90% (\$19,530) of the notice cost that this Court had ruled plaintiff must pay. Because the reason for the preliminary hearing was that plaintiff had claimed (not established in the record at all) that he could not pay any more than nominal notice costs, it seems plain that should defendants eventually prevail on the merits before a jury, which has been demanded in this action, they will never recover the substantial amount of money they are now ordered to pay. The Court's order thus amounts to a clear violation of defendants' rights to trial by jury under the Seventh Amendment and to due process under the Fifth Amendment.

Furthermore, when Judge Tyler set the ground rules for the preliminary hearing, he indicated that the burden was entirely that of plaintiff and that defendants could sit down and say nothing. The Court said:

"I thought about that [defendants' concern about having to present a full-blown defense at the preliminary hearing] because I anticipated that you would raise that point and perhaps I didn't make it precise enough in my discussion in that already frighteningly lengthy last opinion of mine. But I will be completely blunt about it. I mean to say

then and I certainly mean to say now that the burden is on the plaintiff, as I see it, in this mini-hearing, if we use that phrase, and that the defendants are in a very good position if they chose to see it this way in not having any burden at all.

"In other words, even if the plaintiff, if you were to accept me at my word and just sit down and say nothing, maybe cross-examine somebody if they are going to produce a witness a little bit, but if you produce no evidence whatsoever, you would be in the very fortunate position of not being out of court even though you produced no evidence whatsoever." (Tr. of conference with Court, May 17, 1971, pp. 6-7)

The Court's award, following this instruction, compounds the violations of defendants' constitutional guarantees.

The District Court based its substantive conclusions (p. 16) on the fact that the Exchange regulated the differential through settled practice rather than formal rule. Defendants contend that in arriving at these conclusions, the District Court flagrantly ignored and misapplied the principles set forth in *Silver v. New York Stock Exchange*, 373 U. S. 41 (1963); *Kaplan v. Lehman Brothers*, 250 F. Supp. 562 (N. D. Ill. 1966), *aff'd*, 371 F. 2d 409 (7th Cir. 1967), *cert. den.* 389 U. S. 954 (1967); *Thill Securities Corp. v. New York Stock Exchange*, 433 F. 2d 264 (1970), *cert. den.* 401 U. S. 994 (1971); *United States v. Morgan*, 118 F. Supp. 621 (S. D. N. Y. 1953); and *Baird v. Franklin*, 141 F. 2d 238, 242 (2d Cir.), *cert. den.* 323 U. S. 737 (1944) in respect to the following facts, among others, that were placed in the record by defendants at the preliminary hearing:

- (1) Sections 19(b)(9) and (11) of the Exchange Act give the S. E. C. power to order changes in rules

and practices of the Exchange particularly in respect to the fixing of reasonable rates of commission, interest, other charges and odd-lot purchases and sales;

(2) The S. E. C. has concurred that practices are co-equal with rules for purposes of Section 19(b), *In re the Rules of the New York Stock Exchange*, 10 Sec. Dec. & Rep. at 293 (1941);

(3) Historically it had been the practice on the Exchange for the odd-lot differential to be set by the odd-lot firms with the concurrence of the Exchange and the S. E. C., and such practice was left undisturbed by the S. E. C. after lengthy consideration of the Exchange's rules and practices respecting odd-lot trading, including the differential, in the light of, among other things, antitrust considerations. *In re the Rules of the New York Stock Exchange*, 10 Sec. Dec. & Rep. 270 (1941);

(4) Between 1950 and 1964 the Exchange had each year advised the S. E. C. that "transactions in odd-lots are effected on this exchange under methods which have been prescribed by the odd-lot brokers and dealers with the acquiescence of the Exchange";

(5) The 1951 increase in the differential here alleged to be an antitrust violation was, with the approval of the Exchange, presented to the S. E. C. by the odd-lot defendants and elicited S. E. C. approval, as shown by the following minute of the S. E. C.:

"After due consideration, the Commission took the position, and so advised Mr. Hanrahan, that * * * the Commission had no objection to the present proposal for an increase in the odd-lot

differential and would take no action, if the firms of Carlisle & Jacquelin and DeCoppet & Doremus should proceed with such increase." (Ex. J at the preliminary hearing)

(6) The question of the 1951 increase in the differential was thereafter presented to the S. E. C. again by the Midwest Stock Exchange and approved after a two-day hearing (Ex. Q, Ex. 1, p. 182; Ex. 7, pp. 41-44 at the preliminary hearing); and

(7) In April, 1964 the Exchange enacted a formal rule establishing the differential to be the one in effect at the time and in 1966 the Exchange amended that rule at the request of the S. E. C. made pursuant to Section 19(b) of the Exchange Act.

In short, the District Court, despite its disclaimer, has prejudiced all further proceedings in this case by insisting on a "preliminary", i.e., cursory, determination of the merits for the purpose of allowing an assertedly impecunious plaintiff to avoid payment of the cost of notice to the class of which he is the self-proclaimed champion. In doing so, the Court completely ignored the obvious import of one of the crucial facts which it found—that the odd-lot differential was within the S. E. C.'s supervisory powers under Section 19(b) of the Exchange Act. Thus, defendants are penalized for doing what they openly and consistently told the S. E. C. they were doing for a period of over 20 years, and which the S. E. C. permitted them to continue to do although it had the power to stop it.

E. By its avoidance of procedural requirements, the District Court's opinion works substantive injustice upon defendants and a great burden upon the judicial system. The thrust of the District Court's opinions is that a serious wrong has been alleged and it is the duty of the District

Court to do whatever is required, despite commonly accepted rules of procedure, to permit this claim to be prosecuted as a class action. Counsel for appellees believe that such was not the intent of this Court's decision and should not be the law. See generally American College of Trial Lawyers, Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure (March 15, 1972). The District Court's preliminary consideration of the merits alone has been ruled by one Court of Appeals to be sufficient for reversal. *Miller v. Mackey International, Inc.*, CCH Fed. Sec. L. Rptr. ¶ 93,282 (5 Cir. 1971). If the District Court's approach is permitted to stand, defendants in cases such as these for all practical purposes will be deprived of their right to a trial on the merits, and the federal courts will become in great part administrative agencies to preside over class action settlements. See *e.g.*, *West Virginia v. Chas. Pfizer*, 68 Civ. 240 (S. D. N. Y. 1969).

This affidavit sketches only the major areas in which the philosophy of a "class action at any cost" permeates the District Court's decision. There are many other such areas that will be treated in detail should the Court grant this motion establishing a briefing schedule and a date for oral argument. But these major areas are sufficient to show that the District Court's opinions are seriously at odds with the requirements of Rule 23, the Constitution, the Clayton Act, the Exchange Act, and applicable antitrust decisions in respect to regulation by a national securities exchange, and have invaded the exclusive domain of the Securities and Exchange Commission.

If the District Court's opinions remain law, defendants in large purported class actions such as this will be presented with the choice of continuing to litigate on the merits with the risk of financial ruin should they fail or

settling as "an insurance policy" against ruination. See Handler, "Some Shifts from Substantive to Procedural Innovations in Antitrust Suits", 26 Record of the Association of the Bar of the City of N. Y., 124-134 (February, 1971).

Failure to adhere to accepted procedural requirements in class action determinations *ipso facto* deprives defendants who maintain their innocence of a right to a trial on the merits. See *Schaffner v. Chemical Bank*, CCH Fed. Sec. L. Rptr. ¶ 93,403 at p. 93,020 (S. D. N. Y. March 10, 1972). Counsel for defendants know of no large class action which has gone to trial, though settlements, judicially and economically forced, are legion. The result of the District Court's decisions will be to permit any lawyer who can draft a complaint to obtain a favorable class action decision and then an unwarranted settlement. There will, in short, be the danger that this Court warned against (391 F. 2d at 567)—suits brought only for the benefit of lawyers. See American College of Trial Lawyers Report, *supra*, at pp. 20-21. This very real problem cannot be glossed over by saying that no cost is too great if the alternative is the possible risk that wrongdoers will escape unscathed. Compare *Hackett v. General Host Corp.*, *supra*, at p. 91, 391. When the cost becomes deprivation of Fifth and Seventh Amendment rights, a halt must be called. The cost of the District Court's decisions to the federal judicial system will be equally great. The district courts will in great part become administrative agencies for class action settlements. While it is true that the district courts have proved vigorous and resourceful in making such settlements administratively possible, the question is whether such administrative duties should increasingly be permitted to be heaped upon the already overburdened district courts by fostering *in terrorem* settlements of cases that are in fact unmanageable as class actions.

CONCLUSION

The philosophy of the District Court's opinions overlooks the fact that there is injustice on both sides of the coin unless neutral principles are used in determining class action questions. It also overlooks the burden of its consequences on the judicial system. Such neutral principles were set forth in this Court's remand decision. While they have been adopted by the many other courts which have followed this Court's decision, they have been ignored by the District Court to which they were directed. This Court should review now this very important and developing area of the law that is now at a crossroads to restore to life these neutral principles.

William E. Jackson

(Sworn to April 11, 1972.)

(Exhibit omitted.)

**NOTICE OF MOTION TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND
CIRCUIT DATED APRIL 11, 1972,
TO ORDER TRANSMISSION
OF THE RECORD.**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the affidavit of William E. Jackson, sworn to April 11, 1972, the decision, opinion and order of this Court dated March 8, 1968, retaining jurisdiction herein, and the decisions, opinions and orders of the District Court herein dated April 7, 1971 and April 4, 1972, and all prior proceedings, the undersigned will move this Court at a time and date to be designated by the panel that will hear the motion, for an order pursuant to this Court's aforesaid decision directing the Clerk of the United States District Court for the Southern District of New York to certify and transmit the record herein to this Court pursuant to this Court's retention of jurisdiction so that this Court may consider the motion of appellees filed simultaneously herewith requesting this Court to fix a briefing schedule and date for oral argument for the purposes of reviewing and correcting, in the light of this Court's aforesaid decision, the District Court's proceedings and determinations on remand herein concerning the maintenance of this action as a class action, and for such other and further relief as to the Court may seem just and proper.

Dated: New York, N. Y.

April 11, 1972

Notice of Motion

Yours, etc.,
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Attorneys for appellant

**AFFIDAVIT OF WILLIAM E. JACKSON
IN SUPPORT OF MOTION.**

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

[SAME TITLE]

State of New York)
County of New York) ss.:

WILLIAM E. JACKSON, being duly sworn, deposes and says:

I am a member of the firm of Milbank, Tweed, Hadley & McCloy, attorneys for appellee New York Stock Exchange, Inc., and make this affidavit in support of appellees' motion for an order directing the Clerk of the United States District Court for the Southern District of New York to certify and transmit the record herein to this Court pursuant to this Court's retention of jurisdiction so that this Court may consider appellees' motion filed simultaneously herewith to fix a briefing schedule and date for oral argument for the purpose of reviewing and correcting, in the light of this Court's decision of March 8, 1968, the District Court's proceedings and determinations on remand herein concerning the maintenance of this action as a class action.

Pursuant to the remand contained in this Court's decision of March 8, 1968, the record in this action was sent back to the District Court. Appellees are filing with this Court a motion to fix a briefing schedule and date for oral argument pursuant to this Court's retention of jurisdiction. Appellees have requested the Clerk of the United States District Court for the Southern District of New York to

certify and transmit the record herein to this Court pursuant to its retention of jurisdiction so that this Court could consider the aforesaid motion. The Clerk has refused to certify or transmit the record because no notice of appeal has been filed.

WHEREFORE, it is respectfully requested that this motion for an order directing the Clerk of the District Court to certify and transmit the record to this Court be granted.

William E. Jackson

(Sworn to April 11, 1972.)

**ORDER OF THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT DATED
MAY 1, 1972, DENYING MOTION TO FIX BRIEF-
ING AND DATE FOR ORAL ARGUMENT
WITHOUT PREJUDICE TO RENEWAL
AFTER DEFENDANTS HAVE FILED
THEIR BRIEF AND APPENDIX.**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the First day of May, one thousand nine hundred and seventy-two.

[SAME TITLE]

It is hereby ordered that the motion made herein by counsel for the appellees by notice of motion dated April 11, 1972, to set a briefing schedule and date for oral argument of the appeal be and it hereby is denied without prejudice to the renewal of this motion after defendants have filed their Appendix and Brief.

Harold R. Medina
J. Edward Lumbard per HRM
Paul R. Hays

Circuit Judges

May 1st, 1972

**ORDER OF THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT DATED
MAY 1, 1972, GRANTING MOTION TO ORDER
TRANSMISSION OF THE RECORD.**

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the First day of May, one thousand nine hundred and seventy-two.

[SAME TITLE]

It is hereby ordered that the motion made herein by counsel for the appellees by notice of motion dated April 11, 1972, to direct the Clerk of the United States District Court for the Southern District of New York to certify and transmit the record of the Clerk of the United States Court of Appeals for the Second Circuit be and it hereby is granted.

Harold R. Medina
J. Edward Lumbard per HRM
Paul R. Hays

Circuit Judges

May 1st, 1972

**DEFENDANTS' NOTICE OF APPEAL FROM ORDERS
ENTERED ON APRIL 7, 1971 AND APRIL 4, 1972**

**UNITED STATES COURT OF APPEALS
SOUTHERN DISTRICT OF NEW YORK**

Notice is hereby given that defendants Carlisle & Jacquelin, DeCoppet & Doremus, and New York Stock Exchange, Inc. hereby appeal to the United States Court of Appeals for the Second Circuit from the decisions, opinions and orders entered in this case on April 7, 1971 and April 4, 1972 by Hon. Harold R. Tyler, U. S. D. J., on remand.

Dated: New York, N. Y.
May 2, 1972

Carter, Ledyard & Milburn, Esqs.

By Louis L. Stanton

(A member of the firm)

2 Wall Street

New York, N. Y. 10005

Attorneys for defendant

Carlisle & Jacquelin

Kelley Drye Warren Clark Carr &
Ellis, Esqs.

By Francis S. Bense

(A member of the firm)

350 Park Avenue

New York, N. Y. 10022

Attorneys for defendant

DeCoppet & Doremus

Milbank, Tweed, Hadley & McCloy,
Esqs.

A316

Notice of Appeal

By Isaac Shapiro
(A member of the firm)
1 Chase Manhattan Plaza
New York, N. Y. 10005
Attorneys for defendant
New York Stock Exchange, Inc.

To:

Mordecai Rosenfeld, Esq.
233 Broadway
New York, N. Y. 10007

Harold E. Kohn, P. A.
1214 IVB Building
1700 Market Street
Philadelphia, Pa. 19103
Attorneys for plaintiff

**MOTION OF PLAINTIFF IN THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT
FOR ORDER DISMISSING APPEAL.**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the affidavit of Mordecai Rosenfeld, sworn to May 16, 1972, and upon all prior proceedings, the undersigned will move this Court on June 13, 1972 at 10:30 A. M. or as soon thereafter as counsel can be heard for an Order dismissing the appeal herein on the ground that the Orders appealed from are not final orders pursuant to 28 U. S. C. § 1291; and for such other and further relief as may be necessary and proper.

Yours, etc.

Mordecai Rosenfeld
233 Broadway
New York, N. Y. 10007

Harold E. Kohn, P. A.,
Attorneys at Law
1214 IVB Bldg.
1700 Market Street
Philadelphia, Pa.
Attorneys for Plaintiff-Appellee

To:

Kelley Drye Warren Clark Carr & Ellis, Esqs.
350 Park Avenue
New York, N. Y. 10022
Attorneys for Defendant DeCoppet & Doremus

Milbank Tweed Hadley & McCloy, Esqs.

One Chase Manhattan Plaza

New York, New York 10005

Attorneys for defendant New York Stock Exchange, Inc.

Carter Ledyard & Milburn, Esqs.

Two Wall Street

New York, N. Y. 10005

Attorneys for defendant Carlisle & Jacquelin

**AFFIDAVIT OF MORDECAI ROSENFELD, DATED
MAY 16, 1972 IN SUPPORT OF MOTION FOR
ORDER DISMISSING APPEAL.**

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.**

[SAME TITLE]

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Mordecai Rosenfeld, being duly sworn, deposes and says:

I am one of the attorneys for the plaintiff in the above action. I submit this affidavit in support of plaintiff's motion for an order dismissing defendants' appeal on the ground that the Orders sought to be appealed from (the Orders entered by the District Court on April 7, 1971 and April 4, 1972) are not final orders pursuant to 28 U. S. C. § 1291. A copy of defendants' notice of appeal is annexed hereto as Exhibit A.

1. The action has been brought as a class action (a) against two members of the New York Stock Exchange (Carlisle & Jacquelin and DeCoppet & Doremus) charging them with fixing the odd-lot differential in violation of the federal anti-trust laws and (b) against the Exchange itself for failure to perform its statutory duties with respect thereto in violation of the Securities Exchange Act of 1934. By its Order entered April 7, 1971 the District Court held that the action was maintainable as a class action (52 FRD 253), although the Court specifically left open the question as to which side should bear the cost of notice (approximated as \$21,270). To determine that

question, the Court held a separate evidentiary hearing to evaluate the prospect of prevailing that each side had on the merits. As a result of that hearing, the Court, by its Order entered April 4, 1972, allocated the cost of the notice as follows: 90% to be paid by defendants and 10% to be paid by plaintiff. In making that decision, the Court held "that plaintiff and the class he represents are more than likely to prevail at trial or upon a motion for summary judgment"; the Court also found that "[p]laintiff has excellent evidence" that the Exchange violated its statutory duty to the public".* That is, the Court held that plaintiff was likely to succeed at a *future* trial or on a *future* motion for summary judgment.

In short, the case has not been "finally" decided by the District Court. Indeed, Rule 23(c)(1) specifically provides that the District Court may alter or amend its class action determination at any time before a final order is entered; and, most assuredly, no final order has been entered.

2. After entry of the District Court's 1971 Order, the defendants moved in this Court for the entry of an order directing the Clerk of the District Court to certify and transmit the record to this Court and establishing a briefing schedule and date for oral argument in this Court on the theory that this Court still had jurisdiction of the appeal decided in 1968 (see 391 F. 2d 555); defendants' motions were denied. After the District Court's April 4, 1972 Opinion and Order the defendants again moved this Court for the entry of orders directing the clerk of the district court to enter an order directing the clerk of the District Court to certify and transmit the record to this Court, and establishing a briefing schedule and date for

* A copy of the 1972 opinion is annexed hereto as Exhibit B.

oral argument, repeating their submission that this Court still retained jurisdiction of the appeal decided in 1968. On May 1, 1972 this Court entered orders granting the motion for certification and transmission of the record, but denying the motion to set a briefing schedule and date for oral argument of the appeal, without prejudice to its renewal after defendants had filed their appendix and brief. A copy of the two May 1, 1972 Orders of this Court are annexed hereto as Exhibits C and D.

Plaintiff opposed defendants' aforesaid motions in this Court in both 1971 and 1972 on the grounds that (a) this Court had no jurisdiction to entertain the appeals and (b) the appeals should not be heard as a matter of discretion. It is not clear from this Court's Orders of May 1, 1972 whether or not the jurisdictional question has been ruled upon, since one of the defendants' motions was denied. Plaintiff intends to press that jurisdictional argument in subsequent proceedings in this Court arising out of the May 1, 1972 orders.

The present motion to dismiss is limited to the appeal raised by defendants' notice of appeal (Exh. A). That notice was not filed until after this Court had acted on the motions previously made (Exhs. C and D). Plaintiff submits that since the Orders sought to be appealed from are not final, the appeals should be dismissed.

MORDECAI ROSENFELD

Mordecai Rosenfeld

[Jurat omitted]

**ORDER OF UNITED COURT OF APPEALS FOR THE
SECOND CIRCUIT, DATED JUNE 29, 1972, DENYING
MOTION TO DISMISS THE APPEAL.**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[SAME TITLE]

It is hereby ordered that the motion made herein by counsel for the appellee by notice of motion dated May 16, 1972, to dismiss the appeal from the United States District Court for the Southern District of New York for lack of jurisdiction be and it hereby is denied.

HAROLD R. MEDINA,
J. EDWARD LUMBARD,
PAUL R. HAYS,
Circuit Judges.

**MOTION OF DEFENDANTS IN THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT
DATED JULY 26, 1972, TO SET A BRIEFING
SCHEDULE AND DATE FOR ORAL
ARGUMENT.**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the order of this Court dated May 1, 1972 denying appellees' motion dated April 11, 1972 to set a briefing schedule and date for oral argument without prejudice to renewal after defendants have filed their appendix and brief, all papers submitted in connection with the aforesaid motion, the appendix and brief of defendants filed simultaneously herewith, the stipulation of all parties so ordered by the Court on July 3, 1972, the affidavit of William E. Jackson, sworn to July 25, 1972, and all prior proceedings, the undersigned will move to renew their aforesaid motion of April 11, 1972 at a time and date to be designated by the panel that will hear the motion and, for the purpose of reviewing and correcting the District Court's decisions of April 7, 1971 and April 4, 1972, for an order fixing September 29, 1972 as the date for plaintiff's brief to be served and filed, fixing the date of October 13, 1972 as the date for defendants' reply brief to be served and filed, and establishing a date thereafter for oral argument which is convenient to the panel that will hear the argument; for an order pursuant to Rule 28(g), Federal Rule of Appellate Procedure, granting defendants permission to file one joint brief of approximately 57 pages in

length; and for such other and further relief as to the Court may seem just and proper.

Dated: New York, N. Y.

July 26, 1972

Yours, etc.,

CARTER, LEDYARD & MILBURN, ESQS.

2 Wall Street

New York, N. Y. 10005

Attorneys for appellee

Carlisle & Jacquelin

KELLEY DRYE WARREN CLARK CARR &

ELLIS, ESQS.

350 Park Avenue

New York, N. Y. 10022

Attorneys for appellee

DeCoppet & Doremus

MILBANK, TWEED, HADLEY & McCLOY

ESQS.

By WILLIAM E. JACKSON

(A member of the firm)

1 Chase Manhattan Plaza

New York, N. Y. 10005

Attorneys for appellee

New York Stock Exchange, Inc.

To:

MORDECAI ROSENFELD, ESQ.

233 Broadway

New York, N. Y. 10007

HAROLD E. KOHN, P. A.

1214 IVB Building

1700 Market Street

Philadelphia, Pa. 19103

Attorneys for appellant

AFFIDAVIT.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[SAME TITLE]

State of New York)
County of New York) ss.:

WILLIAM E. JACKSON, being duly sworn, deposes and says:

1. I am a member of the firm of Milbank, Tweed, Hadley & McCloy, attorneys for defendant New York Stock Exchange, Inc., and make this affidavit in support of defendants' motion pursuant to this Court's order of May 1, 1972 denying defendants' motion dated April 11, 1972 to set a briefing schedule and date for oral argument without prejudice to renewal after defendants have filed their appendix and brief.
2. The motion of defendants dated April 11, 1972 sought an order fixing a briefing schedule and date for oral argument for the purpose of reviewing and correcting, in the light of this Court's decision of March 8, 1968 retaining jurisdiction herein, the District Court's opinions and orders dated April 7, 1971 and April 4, 1972. A motion was also filed for an order directing the Clerk of the District Court to certify and transmit the record to this Court.
3. This Court granted the motion to transmit and certify the record and denied the motion to set a briefing schedule and date for oral argument without prejudice to renewal of that motion after defendants have filed their appendix and brief.

4. Simultaneously with the filing of the instant motion, defendants are filing their appendix and brief. All parties hereto have stipulated that the answering brief of plaintiff shall be served and filed on September 29, 1972, and that stipulation was so ordered by this Court on July 3, 1972.

5. Defendants are filing one joint brief of approximately 57 pages in length. The instant motion therefore also seeks the Court's permission to exceed the 50 page limit set by Rule 28(g), Federal Rules of Appellate Procedure.

WHEREFORE, defendants pray for an order granting renewal of their motion of April 11, 1972 to fix a briefing schedule and date for oral argument for the purpose of reviewing and correcting the District Court's decisions of April 7, 1971 and April 4, 1972, fixing September 29, 1972 as the date for plaintiff's brief to be served and filed, fixing the date of October 13, 1972 as the date for defendants' reply brief to be served and filed, establishing a date thereafter for oral argument, granting defendants permission to file one joint brief of approximately 57 pages in length, and for such other and further relief as to the Court may seem just and proper.

WILLIAM E. JACKSON
William E. Jackson

(Jurat omitted)

**ORDER OF UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT, DATED AUGUST 24,
1972, SETTING A BRIEFING SCHEDULE.**

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

[SAME TITLE]

It is hereby ordered that the motion made herein by counsel for the appellants by notice of motion dated July 26, 1972, to set the following schedule: appellee shall serve and file his brief by September 29, 1972; appellants shall serve and file their reply brief by October 13, 1972; and to fix the date of oral argument; and for leave to file appellants' brief not exceeding fifty-six printed pages be and it hereby is granted except that the date of oral argument will not be fixed until after all the briefs are in.

**HAROLD R. MEDINA,
J. EDWARD LUMBARD,**
Circuit Judges.

**APPENDIX TO SUPPLEMENTAL STATEMENT OF
DEFENDANTS-APPELLEES IN THE COURT OF
APPEALS FOR THE SECOND CIRCUIT,
DATED DECEMBER 22, 1972.**

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

<i>Date</i>	<i>Nature of Proceeding</i>	<i>Pages of</i>			
		<i>Briefs, Memoranda, Af- fidavits and Other Court Documents</i>	<i>Court Ap- pearances</i>	<i>Pages of Transcript</i>	<i>Opinions, Orders and Judicial Memoranda</i>
May 2 1966	Complaint (A 17) filed; sum- mons issued	8			
May 11	Stipulation and order (May 12, 1966) extending time to respond to complaint			1	
June 1	Notice of Deposition of Reginald P. Rose			4	
June 1	Notice of Deposition of Henry I. Cobb, Jr.			2	
June 1	Notice of Deposition of Van R. Halsey			4	

Appendix to Supplemental Statement

A329

Date 1966	Nature of Proceeding	Pages of Briefs, Memoranda, Af- fidavits and Other Court Documents	Court Ap- pearances	Pages of Transcript	Pages of Opinions, Orders and Judicial Memoranda
June 13	Stipulation and order (June 14, 1966) adjourning depositions	3			
June 16	Defendants' interrogatories to plaintiff	4			
June 24	Answer of defendant New York Stock Exchange (hereinafter "the Exchange") (A 30)	4			
June 24	Answer of defendant Carlisle & Jacquelin (A 24)	3			
June 24	Answer of defendant DeCoppet & Doremus (A 27)	3			
June 30	Plaintiff's answers to defendants' interrogatories	11			
July 1	Notice of Motion, affidavits and memorandum in support of motion by defendant for a determination that action is not maintainable as a class action (A 247-272)	72			
July 8	Plaintiff's affidavits and memorandum in opposition to motion	45			

Date	Nature of Proceeding	Pages of Briefs, Memoranda, Affidavits and Other Court Documents	Court Appearances	Pages of Transcript	Pages of Opinions, Orders and Judicial Memoranda
1966					
July 12	Defendants' reply memorandum in support of motion	10			
July 12	Hearing of motion		X		
Aug. 18	Stipulation and order (Aug. 19, 1966) adjourning depositions	2			
Sept. 23	Stipulation and order (Sept. 26, 1966) adjourning depositions	2			
Sept. 27	Opinion of District Court dismissing the action as a class action (A 43)				23
Oct. 10	Notice of Motion and Memorandum in support of motion by plaintiff for an order resetting and amending opinion and order				
Oct. 20	Defendants' memorandum in opposition to motion	10			
Oct. 21	Stipulation and order (Oct. 24, 1966) adjourning depositions	19			
Oct. 24	Plaintiff's reply memorandum in support of motion	2			
		5			

Appendix to Supplemental Statement

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<i>Date</i>	<i>Nature of Proceeding</i>	<i>Pages of Briefs, Memoranda, Affidavits and Other Court Documents</i>	<i>Court Appearances</i>	<i>Pages of Transcript</i>	<i>Pages of Opinions, Orders and Judicial Memoranda</i>
Oct. 25 1966	Memorandum of District Court denying motion				1
Oct. 28	Plaintiff's Notice of Appeal	1			
Nov. 14	Notice of Motion in Court of Appeals and memorandum in support of motion by defendants to dismiss appeal	11			
Nov. 16	Stipulation and order (Nov. 18, 1966) adjourning motion	2			
Nov. 30	Affidavit and memorandum of plaintiff in opposition to motion to dismiss	17			
Dec. 1	Stipulation and order adjourning hearing of motion	2			
Dec. 5	Stipulation and order (Dec. 6, 1966) extending time to file record on appeal	2			
Dec. 9	Reply memorandum of defendants in support of motion	11			
Dec. 12	Hearing of motion by Court of Appeals		X		
Dec. 19	Opinion denying motion (A 43)				4

Date 1967	Nature of Proceeding	Pages of Briefs, Memoranda, Af- fidavits and Other Court Documents	Court Ap- pearances	Pages of Transcript	Pages of Opinions, Orders and Judicial Memoranda
Jan. 3	Petitions for rehearing or rehear- ing in banc	9			
Jan. 5	Stipulation and order (Jan. 6, 1967) extending time to file rec- ord	2			
Jan. 5	Stipulation and order (Jan. 9, 1967) adjourning depositions	2			
Jan. 13	Petitions for rehearing or rehear- ing in banc denied				2
Mar. 2	Stipulation and order (March 3, 1967) extending time for plaintiff to file brief	2			
Mar. 23	Defendants' petition for a writ of certiorari	20			
Apr. 19	Plaintiff's brief in opposition to petition for certiorari	14			
Apr. 21	Stipulation and order extending time for plaintiff to file brief	2			
Apr. 21	Stipulation and order (Apr. 22, 1967) adjourning depositions	2			

Appendix to Supplemental Statement

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Date 1967	Nature of Proceeding	Pages of Briefs, Memoranda, Af- fidavits and Other Court Documents	Court Ap- pearances	Pages of Transcript	Pages of Opinions, Orders and Judicial Memoranda
Apr. 28	Defendants' reply brief in sup- port of petition for certiorari	6			1
May 8	Petition for certiorari denied				
July 14	Application and order granting plaintiff leave to serve a brief not longer than 62 pages	3			
July 14	Plaintiff's brief	62			
July 17	Stipulation and order (July 23, 1967) extending time for defend- ants to serve answering brief	2			
Sept. 22	Application for adjournment of argument of appeal	2			
Oct. 2	Brief of defendant Carlisle and Jacquelin	26			
Oct. 2	Brief of defendants DeCoppet & Doremus and the Exchange	35			
Oct. 27	Plaintiff's reply brief	18			
Nov. 6	Hearing of appeal		X		
Nov. 8	Stipulation and order (Nov. 9, 1967) adjourning depositions	2			

<i>Date</i>	<i>Nature of Proceeding</i>	<i>Pages of Briefs, Memoranda, Affidavits and Other Court Documents</i>	<i>Court Appearances</i>	<i>Pages of Transcript</i>	<i>Pages of Opinions, Orders and Judicial Memoranda</i>
1968					
Mar. 8	Opinion of Court of Appeals reversing, remanding to the District Court and retaining jurisdiction (A 47)				26
Mar. 8	Dissenting opinion of Chief Judge Lumbard				5
Mar. 11	Call of action for review		X		
Mar. 29	Stipulation and order (April 2, 1968) adjourning depositions	2			
June 7	Hearing before the District Court		X		
July 19	Stipulation and order (August 6, 1968) adjourning date for exchange of informal request for admissions	2		43	
Sept. 6	Notice of Motion, affidavits and memorandum in support of motion to disqualify plaintiff's counsel by defendants	35			
Sept. 23	Plaintiff's affidavits in opposition to motion	9			

Appendix to Supplemental Statement

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<i>Date</i>	<i>Nature of Proceeding</i>	<i>Pages of Briefs, Memoranda, Affidavits and Other Court Documents</i>	<i>Court Appearances</i>	<i>Pages of Transcript</i>	<i>Pages of Opinions, Orders and Judicial Memoranda</i>
1968					
Sept. 23	Stipulation and order (Sept. 24, 1968) adjourning depositions	2			
Sept. 26	Hearing before the District Court on defendant's motion		X		26
1969					
Feb. 12	Notice of Appearance of Mordecai Rosenfeld, Esq., as counsel for plaintiff and Notice of Appearance with Acknowledgment	3			
Apr. 14	Call of action for review		X		
May 13	Call of action for review		X		
June 25	Call of action for review		X		
Oct. 8	Call of action for review		X		
Oct. 14	Plaintiff's interrogatories of defendants	2			
Oct. 27	Stipulation extending defendants' time to object to interrogatories	2			
Nov. 5	Stipulation extending defendants' time to object to interrogatories	2			

<i>Date</i>	<i>Nature of Proceeding</i>	<i>Pages of Briefs, Memoranda, Affidavits and Other Court Documents</i>	<i>Court Appearances</i>	<i>Pages of Transcript</i>	<i>Pages of Opinions, Orders and Judicial Memoranda</i>
1969					
Nov. 14	Answer of the Exchange to interrogatories	4			
Nov. 17	Stipulation extending defendants' time to object to interrogatories	2			
Dec. 2	Stipulation extending defendants' time to object to interrogatories	1			
1970					
Mar. 3	Stipulation Number 1 (A 115)	11			
Mar. 16	Hearing before the District Court		X	19	
Mar. 25	Notice of Motion and affidavit in support of motion by plaintiff to assign action to Hon. Harold R. Tyler, Jr.	7			
Mar. 26	Affidavit in response to motion	1			
Apr. 17	Motion denied without prejudice to renew				1
Apr. 17	Stipulation Number 2 (A 124)	6			
Apr. 30	Hearing before the District Court (A 74)		X	36	
May 7	Affidavit of plaintiff's counsel outlining qualifications	2			

Appendix to Supplemental Statement

A337

<i>Date</i>	<i>Nature of Proceeding</i>	<i>Pages of Briefs, Memoranda, Affidavits and Other Court Documents</i>	<i>Court Appearances</i>	<i>Pages of Transcript</i>	<i>Pages of Opinions, Orders and Judicial Memoranda</i>
June 10 1970	Plaintiff's proposed findings of fact and brief in opposition to defendants' motion to dismiss (A 244)	53			
June 17	Defendants' proposed findings and conclusions	15			
June 19	Hearing before the District Court		X		
July 17	Defendants DeCoppet & Doremus and the Exchange's post-hearing brief	34		14	
July 17	Defendant Carlisle & Jacquelin's post-hearing brief	20			
July 30	Plaintiff's reply memorandum	31			
Oct. 7	Call of action for review				
Oct. 8	Opinion of the District Court requesting further information (A 98)		X		

Date	Nature of Proceeding	Pages of Briefs, Memoranda, Affidavits and Other Court Documents	Court Appearances	Pages of Transcript	Pages of Opinions, Orders and Judicial Memoranda
1971					
Jan. 5	Call of action for review		X		
Jan. 8	Plaintiff's affidavits in response to opinion	5			
Jan. 11	Defendants' affidavits in response to opinion	8			
Jan. 11	Plaintiff's supplemental memorandum	22			
Jan. 11	Defendants' supplemental memorandum	12			
Jan. 11	Defendants' memorandum responding to questions of opinion of October 8, 1970	8			
Apr. 7	Opinion of District Court that action may be maintained as a class action (A 129)				59
May 5	Call of action for review		X		
May 17	Hearing before the District Court (A 168)		X		28
May 21	Notice of Motion and affidavit in support of motion by defendants to the Court of Appeals for an order setting a briefing schedule and a date for oral argument	14			

Appendix to Supplemental Statement

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Date	Nature of Proceeding	Pages of Briefs, Memoranda, Affidavits and Other Court Documents	Court Appearances	Pages of Transcript	Pages of Opinions, Orders and Judicial Memoranda
1971					
May 25	Notice of Motion and affidavit in support of motion by defendants to the Court of Appeals for an order certifying and transmitting the record	4			
May 25	Plaintiff's affidavit in opposition	2			
June 10	Denial of defendants' motions by the Court of Appeals				2
June 17	Interrogatories and Notices to Produce by plaintiff to defendants				
Sept. 7	Notice of Motion, affidavit and memorandum in support of motion by plaintiff to enforce an alleged oral settlement agreement	26			
Sept. 24	Affidavits and memorandum of defendants in opposition to plaintiff's motion and in support of a cross-motion by defendants for a protective order	24			
					23

Date 1971	Nature of Proceeding	Pages of Briefs, Memoranda, Af- fidavits and Other Court Documents	Court Ap- pearances	Pages of Transcript	Pages of Opinions, Orders and Judicial Memoranda
Sept. 30	Plaintiff's reply memorandum and affidavit in support of motion to enforce alleged settlement agreement and memorandum in opposition to defendants' cross-motion for a protective order	2			
Oct. 15	Hearing before the District Court		X	8	
Nov. 5	Hearing before the District Court		X	24	
Nov. 15	Deposition of Herbert E. Milstein			71	
Nov. 16	Call of action for review				
Nov. 19	Letter from defendants to the District Court in opposition to the application of the office of Harold E. Kohn, P.A. to participate as co-counsel for plaintiff		X		
Dec. 2	Memorandum of plaintiff in support of the application of the Kohn firm	8			
		7			

Appendix to Supplemental Statement

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<i>Date</i>	<i>Nature of Proceeding</i>	<i>Pages of Briefs, Memoranda, Affidavits and Other Court Documents</i>	<i>Court Appearances</i>	<i>Pages of Transcript</i>	<i>Pages of Opinions, Orders and Judicial Memoranda</i>
1971					
Dec. 10	Defendants' reply memorandum in opposition to the application of the Kohn firm	9			
Dec. 13	Hearing before the District Court		X	36	
Dec. 15	Memorandum by the District Court permitting the Kohn firm to participate as co-counsel				3
1972					
Feb. 9	Preliminary hearing before the District Court (A 171)				
Feb. 18	Plaintiff's post-hearing memorandum		X	46	
Feb. 18	Defendants' post-hearing memorandum	51			
Apr. 4	Opinion of the District Court on allocation of the cost of notice (A 202)	47			20

Date 1972	Nature of Proceeding	Pages of Briefs, Memoranda, Af- fidavits and Other Court Documents	Court Ap- pearances	Pages of Transcript	Pages of Opinions, Orders and Judicial Memoranda
Apr. 11	Notices of Motions and affidavits in support of motions to the Court of Appeals by defendants for orders setting a briefing schedule and a date for oral argument and for certification and transmittal of the record to the Court of Appeals (A 218, <i>et seq.</i>)	21			
Apr. 19	Plaintiff's memorandum in opposition to defendants' motions	10			
May 1	Defendants' motion for certification and transmittal of the record granted; defendants' motion for a briefing schedule denied without prejudice to renew after defendants have filed their briefs and appendix (A 240-241)				2
May 2	Defendants' Notice of Appeal (A 242)				2

Appendix to Supplemental Statement

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Date	Nature of Proceeding	Pages of Briefs, Memoranda, Affidavits and Other Court Documents	Court Appearances	Pages of Transcript	Pages of Opinions, Orders and Judicial Memoranda
1972					
May 8	Memorandum of the District Court regarding use of documents pertaining to an alleged settlement agreement				
May 17	Notice of Motion, affidavit and memorandum in support of motion by plaintiff to the Court of Appeals for an order dismissing defendants' appeal				2
May 23	Notice of Motion and affidavit in support of motion by plaintiff for leave to supplement the record	9			
May 30	Defendants' designation of contents of appendix	7			
May 30	Defendants' statement of issues for review	3			
June 7	Plaintiff's designation of parts of the record to be included in appendix	2			
June 8	Defendants' memoranda opposing motion to supplement record and motion to dismiss appeal	2			
		23			

Date 1972	Nature of Proceeding	Pages of Briefs, Memoranda, Af- fidavits and Other Court Documents	Court Ap- pearances	Pages of Transcript	Pages of Opinions, Orders and Judicial Memoranda
June 13	Plaintiff's motions for leave to supplement the record on appeal and to dismiss defendants' appeal referred to the panel which heard the previous appeal	4	X	2	
June 14	Plaintiff's designation of exhibits necessary for determination of appeal				
June 16	Defendants' supplemental designation of parts of the record to be included in appendix	2			
June 19	Plaintiff's reply memorandum supporting dismissal of defendant's notice of appeal	3			
June 29	Plaintiff's motions for leave to supplement the record on appeal and to dismiss defendant's appeal denied				2
July 3	Stipulation, affidavit and order extending time by which briefs must be served	4			

Appendix to Supplemental Statement

A345

Date 1972	Nature of Proceeding	Pages of Briefs, Memoranda, Af- fidavits and Other Court Documents	Court Ap- pearances	Pages of Transcript	Pages of Opinions, Orders and Judicial Memoranda
July 26	Notice of Motion and affidavit in support of motion by defendants to renew defendants' motion of April 11, 1972 for a briefing schedule and a date for argument	4			
July 26	Defendants' brief filed	56			1
Aug. 24	Defendants' motion for a briefing schedule granted				
Sept. 29	Plaintiff's brief and application pursuant to Rule 28(g)	54			
Oct. 13	Defendants' reply brief and application pursuant to Rule 28(g)	29			
Dec. 12	Argument of appeal		X	135	

**OPINION OF UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT DATED MAY 1, 1973,
REVERSING CLASS ACTION ORDERS OF THE
DISTRICT COURT, AND CONCURRING
OPINION OF JUDGE HAYS.**

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Nos. 341, 381—September Term, 1972.

(Argued December 12, 1972

Decided May 1, 1973.)

Docket Nos. 72-1521, 30934

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Plaintiff-Appellee,

v.

CARLISLE & JACQUELIN and DeCOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8 and New York Stock Exchange, an Unincorporated Association,

Defendants-Appellees.

Before:

MEDINA, LUMBARD and HAYS,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Harold R. Tyler, Jr., *Judge*, holding that suit by investor on behalf of

himself and other odd-lot stock investors against major odd-lot dealers on New York Stock Exchange and against New York Stock Exchange, was maintainable as a class action, and, following a preliminary hearing, ordering the defendants to bear 90% of the costs of notice.

The action was originally dismissed as a class action, 41 F. R. D. 147, and this Court reversed and remanded to the District Court for further findings necessary for the class action determination, 391 F. 2d 555. Jurisdiction was retained by this Court.

Reversed.

AARON M. FINE, Philadelphia, Pennsylvania
(Harold E. Kohn and Allen D. Black,
Philadelphia, Pennsylvania, and Mordecai
Rosenfeld, New York, N. Y., on the brief),
for Plaintiff-Appellee.

DEVEREUX MILBURN, New York, N. Y. (Louis L.
Stanton, Jr., James E. Massey, and Carter,
Ledyard & Milburn, New York, N. Y., on
the brief), *for Defendant-Appellee Carlisle
& Jacquelin.*

FRANCIS S. BENSEL, New York, N. Y. (Bud G.
Holman and Kelley Drye Warren Clark
Carr & Ellis, New York, N. Y., on the
brief), *for Defendant-Appellee DeCoppet &
Doremus.*

WILLIAM E. JACKSON, New York, N. Y. (Russell
E. Brooks and Milbank, Tweed, Hadley &
McCloy, New York, N. Y., on the brief),
*for Defendant-Appellee New York Stock
Exchange, Inc.*

MEDINA, Circuit Judge:

Sufficient factual background for an understanding of the rulings we are about to make in this extraordinary "class action" is to be found in our first opinion *Eisen v. Carlisle & Jacquelin*, 391 F. 2d 555 (1968), often referred to as *Eisen II*. On that appeal we remanded the case to the District Court for reconsideration and for findings on specific issues and we retained jurisdiction.¹ While enter-

1. We retained jurisdiction because of the doubt engendered by the phraseology of the "death knell" opinion, *Eisen v. Carlisle & Jacquelin*, 370 F. 2d 119 (2d Cir. 1966), cert. denied, 386 U. S. 1035 (1967) (*Eisen I*). We thought this case might be construed as making appealable an interlocutory order dismissing a case as a class action "because no lawyer of competence is going to undertake this complex and costly case to recover \$70 for Mr. Eisen," see *Korn v. Franchard Corp.*, 443 F. 2d 1301 (2d Cir. 1971); *Green v. Wolf Corp.*, 406 F. 2d 291 (2d Cir. 1968), cert. denied, 395 U. S. 977 (1969), but perhaps denying appealability to a similar order holding the case to be a proper class action under amended Rule 23. While the "death knell" doctrine has been criticized by the Third Circuit in *Hackett v. General Host Corp.*, 455 F. 2d 618 (3d Cir.), cert. denied, 407 U. S. 925 (1972), we think the consequences of class action rulings are so serious that these interlocutory orders should be made appealable, provided we adopt the view expressed by Chief Judge Friendly in *Korn v. Franchard Corp.*, *supra*, 443 F. 2d at 1307, to the effect that this Court should formulate the rule of appealability in such fashion that it "will afford equality of treatment as between plaintiffs and defendants." The same considerations which led this Circuit to apply the rule of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949) in *Eisen I*, also would seem to require a rule allowing a defendant to appeal from an interlocutory order permitting the representative plaintiff to continue the suit as a class action.

The "collateral order" doctrine of *Cohen* is based on the pragmatic view that a decision which finally determines an issue in the case which is crucial to the further conduct of the case, and is collateral to the merits of the action, is to receive immediate appellate review if delay in such review will cause "irreparable harm" to the complaining party. The seeds of *Cohen* were sowed by the Supreme Court as early as *Forgay v. Conrad*, 6 Howard 201, 205 when it was said that appealability should be allowed if the effect of an interlocutory order is such that if the order is immediately carried into execution the defendant "may be ruined before he is permitted to avail himself of the right" to appeal. An order sustaining a class action allegation clearly involves issues "fundamental

taining grave doubts on the questions of notice and manageability, we thought the original rejection of the case as a class action had been too summary, that improper standards had been applied and inadequate consideration given to the specific requirements of amended Rule 23.

After almost five years the case is before us again. While much of the delay is not attributable to further proceedings bearing on issues arising under amended Rule 23, a very considerable amount of the time of Judge Tyler and of the lawyers for the respective parties has, in this interval of five years, been devoted to hearings, the taking of depositions, and the preparation and filing of various District Court opinions, preceded by briefs and extensive oral arguments. Much of this time was devoted to an effort by Eisen's counsel to meet the apparently insurmountable difficulties of notice and manageability by adopting the erroneous and frustrating view that some way *must* be found to make the case viable as a class action. In the end Judge Tyler was persuaded that the innovations described by Judge Weinstein in his speeches² and in his series of opin-

1. (Cont'd.)

to the further conduct of the case;" (see *Gillespie v. United States Steel Corp.*, 379 U. S. 148 (1964); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U. S. 682 (1949); *United States v. General Motors Corp.*, 323 U. S. 373 (1945)); the order is also separable from the merits of the case; and irreparable harm to a defendant in terms of time and money spent in defending a huge class action when an appellate court may years later decide such an action does not conform to the requirements of Rule 23, is evident. By this extension or interpretation of *Eisen I* the rule of finality would be given a "practical rather than a technical construction," see *Cohen*, *supra*, 337 U. S. at 546; *Gillespie v. United States Steel Corp.*, *supra*, 379 U. S. at 152, and we would avoid a possible denial of justice caused by delaying review by permitting an interlocutory appeal of rulings either sustaining or striking class action allegations. See *Swift & Company v. Compania Colombiana*, 339 U. S. 684 (1950); *Dickinson v. Petroleum Corp.*, 338 U. S. 507 (1950)).

2. Judge Weinstein's speech on this subject was reported in Weinstein, "The Class Action Is Not Abusive," *New York Law Journal*, May 1, 1972, p. 1, and May 2, 1972, p. 1.

ions in *Dolgow v. Anderson*, 43 F. R. D. 21 (1967); 43 F. R. D. 472 (1968); 45 F. R. D. 470 (1968); 53 F. R. D. 661 (1971); 53 F. R. D. 664 (1971), were authorized by amended Rule 23. These innovations were the preliminary mini-hearing on the merits and the "fluid recovery," both of which will be fully described in due course. It is clear to us that, with or without these innovations, the notice provided by amended Rule 23 to be given "to all members (of the class) who can be identified through reasonable effort" cannot be given, as Eisen refuses to pay or put up any bond to cover this expense, and, if defendants prevail on the merits, they will be unable to recover any amounts expended by them for this purpose. We are also of the opinion that, on the basis of the new evidence now before us, the lawsuit is unmanageable as a class action, and that no preliminary mini-hearing on the merits and no "fluid recovery" procedures are authorized by the text or by any reasonable interpretation of amended Rule 23. Accordingly, we reverse and dismiss the case as a class action. We also vacate the findings of fact and conclusions of law that were made after the preliminary mini-hearing on the merits.

I

The Decision Below—52 F. R. D. 253 (1971)

In 1968, when the case was previously before us, it was estimated by someone that there were 3,750,000 members of the class, consisting of those who had bought or sold odd lots on the New York Stock Exchange in the period from May 1, 1962 through June 20, 1966. It was then doubtful whether any of the members of the class could be "identified through reasonable effort." Eisen's position then was and now is that, except possibly in the eventuality of the ultimate adoption of Judge Tyler's suggested plan

which envisages payment by defendants of 90% of the cost of giving notice, he will not defray any of the expense of giving notice to any of the members of the class, nor will he post any bond to reimburse defendants for any of their disbursements, pursuant to any order of the District Court, made for the purpose of giving any notice.

It now appears that there are 6,000,000 members of the class and of these 2,250,000 can be easily identified.³ Members of the class reside in every state of the United States and most foreign countries. They speak and understand a great variety of modern languages. The damages sought to be recovered were estimated at the time we last considered the case at something between a maximum of \$60,000,000 and a minimum of \$22,000,000.⁴ Now the estimate has been raised by Eisen's counsel to 120 millions of dollars.

In our prior opinion we stated unequivocally that actual notice must be given to those whose identity could be ascertained with reasonable effort and that "in this type of case" plaintiff must pay the expense of giving notice to these members of the class.⁵ We further stated that if this

3. According to the opinion below, the names and addresses of approximately 2,000,000 class members can be identified. In addition, another 100,000 or more had odd-lot transactions in stocks listed on the Exchange through what is called the "Monthly Investment Plan." These individuals can be identified through computer tapes in a manner similar to that used for locating the 2,000,000. Furthermore, another 150,000 or so public individuals had odd-lot transactions in stocks listed on the Exchange through "payroll deduction plans" operated by Merrill Lynch, Pierce, Fenner & Smith, Inc. Their names and addresses can be identified through the records of Merrill Lynch.

4. 52 F. R. D. 253, 265 (S. D. N. Y. 1971).

5. We did not in our opinion in *Eisen II* intend our statement that "in such a case as this" plaintiff should defray the cost of notice to be dictum, as has been suggested, see *Berland v. Mack*, 48 F. R. D. 121, 131 (S. D. N. Y. 1969). This statement was part of our interpretation of amended Rule 23 as applied in this case, especially with

could not be done there might be no other alternative than the dismissal of the case as a class action. For some reason not clear to us Judge Tyler disregarded these holdings and concluded that he had discretion, even with reference to those members of the class who could be easily identified, to provide for such notice as he thought to be reasonable in the light of the facts of this particular case.

Thus he directed actual notice only to "the approximately 2000 or more class members who had ten or more transactions during the relevant period" and to "5000 other class members selected at random" from the 2,500,000 class members who could easily be identified.⁶ With respect to

5. (Cont'd.)

respect to the actual individual notice required by subdivision 23(c)(2) to be given to those members of the class who could be identified. This was part of our instructions to conduct a hearing on the remand and decide whether the requirements of amended Rule 23 had been or could be met.

Nor did we decide or intend to say that in all cases or under all circumstances plaintiffs in class actions are or must be required to defray the cost of giving the various notices specified in amended Rule 23. This is an action to recover money damages for alleged violations of Section 4 of the Clayton Act and Section 6 of the Securities and Exchange Act of 1934. It is not a derivative stockholder's action asserting a cause of action in favor of a defendant corporation, which regularly sends communications to all the stockholders and may be said to owe its stockholders certain fiduciary duties, nor a case where a public utility corporation which regularly sends monthly bills to its current customers has been held to have overcharged its customers and the class suit is brought to compel a refund. There may be other similar examples of class actions in which, depending on the circumstances of particular cases, courts might find justification for holding that a representative plaintiff was not obligated to defray the cost of giving the notices required by amended Rule 23. We do not attempt any enumeration. It must be recalled that the provisions for notice in amended Rule 23 were intended to comply with constitutional requirements. See Advisory Committee's Note, 39 F. R. D. 69, 107.

6. Judge Tyler in discussing the notice problems observed that the plaintiff had also offered to send individual notice to all member firms of the New York Stock Exchange and to all commercial banks with large trust departments. This together with the individual notice to the 2000 class members with ten or more transactions and the 5000

the rest of the 6,000,000 members of the class, Judge Tyler ordered what, without reciting all the details concerning the schedule of proposed publications, we consider to be a totally inadequate compliance with the notice requirements of amended Rule 23. One of the reasons for this was perhaps because Judge Tyler thought of these first notices, by mail and by publication, as merely the first of a series of notices. Judge Tyler then deferred the question of who should pay for this first round of notices until after a "brief" preliminary hearing on the merits. This is what is called the "mini-hearing." We shall have more to say later about this preliminary mini-hearing on the merits of Eisen's triple damage antitrust claim. Accordingly, the hearing was held "on the issue of the allocation of the costs of notice" and Judge Tyler concluded that the defendants must bear 90% of these expenses.

To describe Judge Tyler's general scheme as it slowly developed 'in the series of his many opinions' following the remand would be too tedious. The sum and substance of it was that he at last realized that it was highly improbable that any great number of claims would, for a variety of reasons, ultimately be filed by the 6,000,000 members of the class. No claimant in the 6 years of the progress of the action had shown any interest in Eisen's claim. The average odd-lot differential on each transaction had been \$5.18. The average individual class member engaging in five transactions would have paid a total odd-lot differential of \$25.90. Assuming a 5% illegal overcharge the recovery is approximately \$1.30, and when

6. (Cont'd.)

selected at random, and the notice by publication, would in Judge Tyler's view "increase the likelihood of reaching a significant portion of the class," and would be in conformity with the requirements of due process.

7. Judge Tyler's opinions following the remand are reported at 50 F. R. D. 471, 52 F. R. D. 253, and 54 F. R. D. 565.

trebled the average class member would be entitled to damages of \$3.90. As the costs of administration might run into the millions of dollars, it was not likely that a rush of claimants would eventuate no matter how extensive the publication. As he had surmised in the beginning, and as Chief Judge Lumbard stated in his dissent (*Eisen II*, p. 571), the class action was hopelessly unmanageable. So Judge Tyler tried to pull the case out of this morass by resorting to the "fluid recovery," which had been used as a vehicle for carrying out a voluntary settlement in the *Drug Cases, State of West Virginia v. Chas. Pfizer & Co., Inc., et al.*, 314 F. Supp. 710 (S. D. N. Y. 1970).⁸

The concept of this "fluid recovery" is very simple. Having decided that there is no conceivable way in which any substantial number of individual claimants can ever be paid, "the class as a whole" is substituted for the 6,000,000 claimants. Thus the first round of notices becomes relatively unimportant. The scheme adopted envisages the first round of notices as sufficient to get the ball rolling. Little is said about Step Two. This involves a trial of the case to a judge and jury on the merits—not a preliminary mini-trial this time, but a real full scale trial of the private triple damage antitrust case. In some way the damages to "the class as a whole" will be assessed and the defendants, it seems to be assumed, will promptly pay this huge sum into court. This sum is supposed to constitute the "gross damages" to "the class as a whole." With the money in hand, the case begins to resemble the *Transitron* and *Drug Cases* and from then on we are to have the real notices soliciting the filing of claims, the processing of these claims, the fixing of counsel fees and the payment of the general expenses of administration. As "the class as a whole" will include all those

8. Judge Wyatt's approval of the settlement was affirmed by this Court at 440 F. 2d 1079 (1971).

who had purchased or sold in the period from mid-1962 to mid-1966 and all those who, at the time of assessing the full damages, were presently purchasing or selling, and those who might in the future purchase and sell, securities in lots of less than 100 shares, it is quite apparent that some of the original 6,000,000 claimants will receive nothing, because they have never heard of the case or for other reasons have failed to file claims and have them processed, and many other new traders, who had no transactions in the period from mid-1962 to mid-1966, will receive some payments. According to Judge Tyler, at least those members of the original class of 6,000,000 who "have maintained their odd-lot activity, will reap the benefits of any recovery" (52 F. R. D. at p. 265). As far as we are aware there has never been, nor can there ever be, a reliable or even rational estimate of how many traders, whether speculators or investors, can be said to be expected to continue as such after the lapse of 10 years or so. As it is suspected that relatively few claims will be filed and the damages assessed are supposed to cover the losses of "the class as a whole," there will be a huge residue, similar to the amounts paid to various charities "to advance public health projects" in the *Drug Cases*, and this residue is to be used for the benefit of all odd-lot traders by reducing the odd-lot differential "in an amount determined reasonable by the court until such time as the fund is depleted." 52 F. R. D. at p. 265. We are at a loss to understand how this is to be done, but it is suggested that it "might properly be done under SEC supervision or at least with SEC approval."

Despite its early expression of doubt on the subject,⁹ and what appears at least to be *de facto* exercise of super-

9. According to the Report of the Special Study of Securities Markets, Vol. I, p. 182 (1963), an attorney representing the odd-lot firms presented a proposal for an increased differential. The Direc-

visory powers over Rules or practices on the subject of the amount and uniformity of the rate of commissions on odd-lot purchases and sales, the SEC finally did exercise such powers¹⁰ and we hold that at all times the SEC possessed such powers under Sections 11(b)¹¹ and 19(b)¹² of the Securities Exchange Act of 1934. No District Court has authority to decide upon the rate of such commissions to take effect until the exhaustion of any residual fund left over by application of a "fluid recovery" in a private triple damage antitrust case, after the payment of claims in a class action or otherwise. The courts may review rulings of the SEC, but they have no more power than the District Court to fix any such rates in the first place or to give directions to the SEC concerning the fixing of such rates or the time within which such rates are to be effective, as part of a judgment in a private triple damage antitrust case.

9. (Cont'd.)

tor of the Division of Trading and Exchange expressed some doubt as to the Securities and Exchange Commission's jurisdiction over the matter. The Report states that "(t)he Commission declined to decide the jurisdictional question but stated that it had no objection to the proposal. It is to be noted that neither the Exchange nor the Commission asserted jurisdiction, the former denying its jurisdiction and the latter expressing doubts, yet each informally acquiesced in the increase." See also p. 200 of the Report.

10. At the preliminary hearing defendants' Exhibit C contained a letter from the SEC to the New York Stock Exchange dated June 16, 1966. In part the letter stated that the "Commission hereby makes written request pursuant to section 19(b) of the Securities Exchange Act that the Exchange effect on its own behalf changes in its rules and practices in respect of odd-lot purchases and sales, and the fixing of reasonable rates of commission and other changes in connection therewith, to fix odd-lot differentials * * *."

11. 15 U. S. C., Section 78k(b).

12. 15 U. S. C., Section 78s(b).

II

Disposition of Certain Contentions of the Parties

Solely for the purpose of making our holdings clear in this difficult and complicated case we think it proper first to dispose of certain contentions of the parties.

A

We must reject Eisen's claim that the fluid class recovery theory is not ripe for review. Indeed, there is no way to side-step this issue. We specifically remanded the case for consideration of the problem of manageability. The further proceedings on the remand were necessarily concerned with ascertaining whether there was a judicially sound way effectively to administer this action. Administration, of course, includes proof of damages and the distribution of the same. As we point out later in this opinion, Eisen concedes that the action is not manageable if fluid class recovery is not permissible. We must face this issue if we are to pass on the question of manageability, which is the most important point in the case. We are no longer at the early stages of this case where it might be possible to put off to a later time the troublesome question of what to do with the damage fund if only a small number of claims are filed against the fund. See *In Re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 281-2 (S. D. N. Y. 1971).

B

Moreover, we think the three cases cited by Judge Tyler as "respectable precedent" for fluid class recovery are all distinguishable. These three cases are: *Bebchick v. Public Utilities Commission*, 318 F. 2d 187 (D. C. Cir.), cert. denied, 373 U. S. 913 (1963); the *Drug Cases*, 314 F. Supp. 710 (S. D. N. Y.), aff'd 440 F. 2d 1079 (2d Cir.

1971); and *Daar v. Yellow Cab Company*, 67 Cal. 2d 695, 64 Cal. Rptr. 724, 433 P. 2d 732 (1967).

Judge Wyatt's extraordinary feat of judicial administration in carrying out the terms of the one hundred million dollar settlement in the *Drug Cases* deserves all the praise it has received. But it was a consensual affair made possible by the agreement of the parties and without objection to the assumption by the District Court of jurisdiction to accept and administer the fund. Here we have no fund. There is no settlement. Every issue is contested and litigated. And authority to permit this action to proceed as a class action must be found within the four corners of amended Rule 23, as interpreted in the Reviser's Note. Applying this test we hold Eisen's class action must be dismissed. *Bebchick* was not a class action in any sense of the word. Amended Rule 23 was not involved. In the exercise of its powers of review, the Court of Appeals for the District of Columbia Circuit reversed a judgment of the District Court approving the action of the Public Utilities Commission of the District of Columbia supporting a fare increase by the transit company. In the meantime, the additional cash fares, now found to be illegal, had been collected. There was no way to direct refunds as those who paid these cash fares could not be identified. So, also in the exercise of its powers of review the Court of Appeals directed the amount of these additional cash fares to be set up in the books of the transit company to be used, in the discretion of the regulatory commission "to benefit bus riders as a class in pending or future rate proceedings." We cannot find that this case has any bearing on any of the issues in this amended Rule 23 case. Finally, *Daar* was a case arising under a state class action statute very different in its phraseology from amended Rule 23. The ruling was made on a demurrer to the com-

plaint so the approach to the legal issues was entirely different from the making of a judicial determination, on the basis of proof, of whether or not the requirements of amended Rule 23 had been met. Moreover, the court was evidently of the view that the individuals who had been damaged by the alleged overcharge in taxi fares would ultimately have to prove their separate and individual damages. 433 P. 2d at 740.

For the reasons stated in this opinion we disagree with the holding in the *Dolgow* cases.

C

The Merits of Eisen's Triple Damage Antitrust Claim

The defendants by extensive and even cogent arguments have urged us not only to vacate Judge Tyler's findings and conclusions on the merits of the case but to decide that there is no merit in Eisen's antitrust claim. Thus the defendants argue that in the context of an antitrust suit brought against defendants acting within a self-regulatory industry the *per se* rule of antitrust liability is inapplicable, and that even under a rule of reason the practices of the odd-lot defendants and the Exchange were not violative of the antitrust laws. In essence the defendants contend that Judge Tyler incorrectly applied the *Silver v. New York Stock Exchange*, 373 U. S. 341 (1963) doctrine, and should have concluded that the fixing of the odd-lot differential is necessary to the proper implementation of the Securities Act. Also the defendants assert that the Securities and Exchange Commission has primary jurisdiction over the substantive issues presented in this litigation. As already appears in this opinion, we hold and decide that the SEC does possess supervisory powers over the amount and uniformity of the commissions to be paid on odd-lot purchases and sales. But this is only part of the picture. There

are many facets to this complicated case. We feel it is proper for us to say only that the record before us constitutes no proper basis for any decision of the merits, tentative or otherwise.

III

Controlling Principles

When discoursing on the arts or belles-lettres colorful language stimulates the imagination, beguiles one into useful symbolism and opens up the avenues to creative thought. But in the process of rationalizing legal conclusions and arriving at a sound and proper determination of questions of the interpretation of statutes, procedural rules and constitutional limitations, clichés and rhetorical devices generally miss the mark. Something more substantial is necessary to establish a base for the proper decision of difficult and complex questions of law. One reason for this is that the solution is found more often than not by the application of fundamentally simple principles.

Thus statements about "disgorging" sums of money for which a defendant may be liable, or the "prophylactic" effect of making the wrongdoer suffer the pains of retribution and generally about providing a remedy for the ills of mankind, do little to solve specific legal problems. The result of this approach is almost always confusion of thought and irrational, emotional and unsound decisions. In cases involving claims of money damages all litigation presumes a desire on the part of the judicial establishment to make the wrongdoer pay for the wrongs he has committed, but to do this by applying settled or clearly stated principles of law, rather than by some process of divination. Punishment of wrongdoers is provided by law for criminal acts in statutes making it a crime punishable by fine or imprisonment to violate the antitrust laws. In cer-

tain civil suits punitive damages may be awarded; and in private antitrust cases the possible recovery of triple the loss actually suffered by a plaintiff is very properly praised as a supplementary deterrent. But none of these considerations justifies disregarding, nullifying or watering down any of the procedural safeguards established by the Constitution, or by congressional mandate, or by the Federal Rules of Civil Procedure, including amended Rule 23. It is a historical fact that procedural safeguards for the benefit of all litigants constitute some of the most important and salutary protections against oppressions,¹³ including oppressions by those whose intentions may be above reproach.

We adhere to what we have written in support of the remand of this case in *Eisen II*. On the basis of the new evidence adduced on the remand, what we are now doing is interpreting and applying various provisions of an amended and improved procedural device intended to facilitate the judicial disposition of the individual claims of the separate members of a class of persons so numerous that joinder of all members is impracticable. Amended Rule 23 was not intended to affect the substantive rights of the parties to any litigation. Nor could it do so as the Enabling Act that authorizes the Supreme Court to promulgate the Federal Rules of Civil Procedure provides that "such rules shall not abridge, enlarge or modify any substantive right."¹⁴

13. The procedural safeguards we speak of were wisely embodied in the Fifth Amendment's Due Process Clause. The importance of due process of law and procedural fairness has been emphasized by some of our leading jurists. Justice Brandeis observed that "in the development of our liberty insistence upon procedural regularity has been a large factor." (*Burdeau v. McDowell*, 256 U. S. 465, 477 (1921) (dissenting opinion)). Justice Frankfurter also remarked that "(f)airness of procedure is 'due process in the primary sense * * *'. It is ingrained in our national traditions." (*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 161 (1951) (concurring opinion)).

14. 28 U. S. C., Section 2072.

The applicable substantive law is Section 4 of the Clayton Act¹⁵ that authorized the private triple-damage antitrust suit to recover damages by a person who has been "injured in his business or property" by reason of a violation of the antitrust laws. That the claims of many may not be treated collectively or as "the class as a whole" is what the Supreme Court decided in *Snyder v. Harris*, 394 U. S. 332 (1969), where plaintiff, in a diversity case sued as representative of a class of some 4000 shareholders of an insurance company. Her individual claim was for less than \$10,000. She was not permitted to aggregate her claim with the separate claims of the other members of the class which amounted to \$1,200,000. Despite the fact that amended Rule 23 was already in effect, the case was dismissed. Moreover, in the recent case of *Hawaii v. Standard Oil Co. of California, et al.*, 405 U. S. 251 (1972),¹⁶ it was again held that only persons actually injured in their business or property could claim damages under the Clayton Act.

Eisen also alleges that the Exchange is liable for its failure to regulate the odd-lot differential as required by Section 6 of the Securities Exchange Act. He argues that Section 6, 15 U. S. C., Section 78f, requires the securities exchanges to prescribe rules and regulations for the regulation of the industry. Failure so to regulate allegedly subjects the defendant-Exchange to liability to those who have suffered injury due to the abdication of this regula-

15. 15 U. S. C., Section 15.

16. The District Court in *Hawaii v. Standard Oil Co.*, 301 F. Supp. 982 (D. Hawaii, 1969) dismissed the class action allegation on the ground that "under the circumstances * * *, the class action based upon the injury to every individual purchaser of gasoline in the State, * * * in the context of the pleadings, would be unmanageable." Hawaii, however, decided not to appeal this ruling to the Ninth Circuit, and, of course, the ruling was not before the Supreme Court for review in *Hawaii v. Standard Oil Co.*, 405 U. S. 251, 256, n. 6 (1972).

tory responsibility. The duty to regulate emanates from the Exchange Act, but the right of an injured party to recover damages is, according to Eisen, based upon federal common law, *J. I. Case Co. v. Borak*, 377 U. S. 426 (1964); *Baird v. Franklin*, 141 F. 2d 238 (2d Cir.), cert. denied, 323 U. S. 737 (1944). Thus, if Eisen is correct and Section 6 of the Act creates a statutory duty on the Exchange to protect members of plaintiff's class, then these members "may sue for injuries resulting from its breach and (the) common law will supply a remedy if the statute gives none," *Baird v. Franklin*, 141 F. 2d at 245.

The fundamental doctrine that permeates our opinion in *Eisen II*, and which we are now about to apply again in this same case, is whether the requirements of amended Rule 23 have been met. We find no helpful analogy in the procedures that have been used for generations in connection with preliminary injunctions or other provisional remedies intended to preserve the *status quo*.

So, we shall proceed to examine in some detail the provisions of amended Rule 23 in the light of the long and explicit Advisory Committee's Note, 39 F. R. D. 98, and decide whether or not Judge Tyler has followed our directions to appraise and to apply each of the factors enumerated on the face of the Rule. In the light of our conclusions with respect to notice and manageability, we do not reach the subject of adequate representation.

IV

*Lack of Individual Notice to "All Members
Who Can be Identified Through
Reasonable Effort"*

Our prior ruling in *Eisen II* is clear and specific. If identification of any number of members of the class can readily be made, individual notice to these members must

be given and Eisen must pay the cost. If this cannot be done, the case must be dismissed as a class action. Amended Rule 23(c)(2) unambiguously states that notice to the class generally shall be the "best notice practicable," and then "including individual notice to all members who can be identified through reasonable effort." Moreover, the Advisory Committee's Note states (39 F. R. D. 106-7): "Indeed, under subdivision (c)(2), notice must be ordered, it is not merely discretionary * * *." While Judge Tyler seems to have realized that this phase of amended Rule 23 has decided constitutional overtones, he apparently thought the flexibility of the Rule and our statment that the Rule was to be given a liberal interpretation authorized him to exercise his discretion even if this involved the complete disregard of our specific and unambiguous ruling on the subject of actual individual notice to identifiable members of the class. This ruling alone compels a reversal of the order appealed from and the dismissal of the case as a class action.

17. The *Drug Cases*, *supra*, 314 F. Supp. 710 (S. D. N. Y. 1970), *aff'd* 440 F. 2d 1079 (2d Cir. 1971), contain nothing that gives support to Judge Tyler's ruling that individual notice to a limited number of members of a group of 2,450,000 whose names and addresses were identified was sufficient compliance with the notice requirements of amended Rule 23. An examination of the briefs in the *Drug Cases* makes it clear that reasonable effort would not have uncovered the names and addresses of the members of the consumer class of persons who bought the drugs on prescription at drug stores. Therefore, publication as to the consumer class was deemed sufficient. Moreover, as appellant in the *Drug Cases* attacked the sufficiency of the notice to the members of the wholesaler-retailer class, this Court rejected this argument, observing that individual notice was sent by mail to each and every member of this class whose name was available. 440 F. 2d at 1091.

V

*The Preliminary Mini-Hearing on the Merits Was Not
Authorized by Amended Rule 23 and the District
Court Had No Jurisdiction or Competence
to Hold Such a Hearing*

The Federal Rules of Civil Procedure set forth a considerably variety of procedural devices designed for the disposition of cases on the merits. There may be traditional trials to a judge or to a judge and jury; there may be summary judgments, dismissals with or without prejudice for failure to state a claim and so on. But neither in amended Rule 23 nor in any other rule do we find provision for any tentative, provisional or other makeshift determination of the issues of any case on the merits for the avowed purpose of deciding a collateral matter such as which party is to be required to pay for mailing, publishing or otherwise giving any notice required by law. In most cases the so-called tentative findings and conclusions arrived at without the salutary safeguards applicable to all full scale trials on the merits will be extremely prejudicial to one or the other of the parties who bear the brunt of such findings and conclusions, and such prejudice may well be irreparable.

We agree with the ruling by the Fifth Circuit in *Miller v. Mackey International, Inc.*, 452 F. 2d 424 (5th Cir. 1971), that the preliminary hearing on the merits was improper. As stated by Judge Wisdom, 452 F. 2d at page 427:

In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.

This was the first time, as far as we are aware, that any Court of Appeals has passed on the point. As noted by Judge Wisdom in footnote 5 on page 429 of 452 F. 2d, this Court did not have occasion to rule on the question when it decided the appeal from Judge Weinstein's summary judgment for defendants in *Dolgow*, 438 F. 2d 825 (2d Cir., 1971). While Judge Weinstein's oral order not only granted summary judgment for defendants but also held the case not to be a proper class action, the posture of the case on the appeal to our Court was such that the Court had no occasion to consider the propriety of the preliminary mini-hearing on the merits that had been conducted by Judge Weinstein. Nor was that question before this Court in *Green v. Wolf Corporation*, 406 F. 2d 291 (1968). See footnote 15 on pages 301-2.

Of the few District Court decisions on the point most of these disagree, as, of course, does the Fifth Circuit, with the innovations described in *Dolgow*,¹⁸ and there is little to commend the reasoning or lack of reasoning in the others.¹⁹ No provision is made in amended Rule 23 for

18. Decisions which have rejected the use of a preliminary hearing on the merits to decide the propriety of litigation proceeding as a class action include: *Kahan v. Rosenstiel*, 424 F. 2d 161 (3d Cir.), cert. denied 398 U. S. 950 (1970); *Katz v. Carte Blanche Corp.*, 52 F. R. D. 510 (W. D. Pa. 1971); *Fogel v. Wolfgang*, 47 F. R. D. 213 (S. D. N. Y. 1969); *Cannon v. Texas Gulf Sulphur Co.*, 47 F. R. D. 60 (S. D. N. Y. 1969); *Mersay v. First Republic Corp. of America*, 43 F. R. D. 465 (S. D. N. Y. 1968). Judge Mansfield took the opportunity in *Berland v. Mack*, 48 F. R. D. 121, 132 (S. D. N. Y. 1969) to comment on the preliminary hearing on the merits: "The suggestion that such abuse of the corporate treasury can be avoided by a preliminary hearing to determine the merits of the claim is illusory. Quite aside from the additional burden that it heaps upon the Court, it would be a rare case where the Court could assure the class of ultimate success even after a preliminary hearing."

19. Cases supporting a preliminary hearing on the merits are *Milberg v. Western Pacific Railroad Co.*, 51 F. R. D. 280 (S. D. N. Y. 1970), appeal dismissed, 443 F. 2d 1301 (2d Cir. 1971), and, of course, *Dolgow v. Anderson*, 43 F. R. D. 472 (E. D. N. Y. 1968).

any such mini, preliminary or other hearings on the merits. It does violence to the whole concept of summary judgment, and cannot be reconciled with the requirement in Rule 23 that "as soon as practicable after the commencement of the action" the question of class suit *vel non* be decided.

Moreover, in this case we did not in our disposition of the prior appeal intend to relinquish to the District Court any jurisdiction to pass on the merits of the case but only to decide if the requirements of amended Rule 23 had been met. Accordingly, we are constrained to hold that the whole preliminary mini-hearing on the merits proceeding, including the findings of fact and conclusions of law, was conducted and made without jurisdiction.

VI

As a Class Action the Case Is Unmanageable

From the beginning it has been Judge (then Chief Judge) Lumbard's view that as a class action the case is unmanageable and that it should be dismissed as a class action. It turns out that he was right. As soon as the evidence on the remand disclosed the true extent of the membership of the class and the fact that Eisen would not pay for individual notice to the members of the class who could be identified, and the evidence further disclosed that the class membership was of such diversity and was so dispersed that no notice by publication could be devised by the ingenuity of man that could reasonably be expected to notify more than a relatively small proportion of the class, a ruling should have been made forthwith dismissing the case as a class action. This dismissal could have saved several years of hard work by the judge and the lawyers and wholly unnecessary expense running into large figures. The fact that the cost of obtaining proofs of claim by indi-

vidual members of the class and processing such claims was such as to make it clear that the amounts payable to individual claimants would be so low as to be negligible also should have been enough of itself to warrant dismissal as a class action. Other cases involving millions of diverse and unidentifiable members of an alleged class had been dismissed as unmanageable or altered in composition.²⁰ And so even *Eisen* and his counsel conceded that the class was not manageable unless the "fluid recovery" procedures were adopted.

Thus, in the language of Eisen's counsel:

There are some six million persons in the class. If each had to present his own personal claim for damages, the class, indeed, would not be manageable. The facts in Stipulation No. 2 only underscore the obvious. In both *Cherner v. Transitron Electronic Corporation*, 201 F. Supp. 934 (D. Mass. 1962) and *Illinois Bell Telephone Co. v. Slaterry*, 102 F. 2d 58 (7th Cir. 1939) (the cases included in Stipulation No. 2), the refund process overwhelmed the refunds. And both cases involved, quite obviously, classes much smaller than the class at bar.

Where there are millions of dispersed and unidentifiable members of the class notices by publication giving the essential information required by amended Rule 23 are a

20. See, *City of Philadelphia v. American Oil Co.*, 53 F. R. D. 45 (D. N. J. 1971); *United Egg Products v. Bauer International Corp.*, 312 F. Supp. 319 (S. D. N. Y. 1970); *Hackett v. General Host Corp.*, Civil No. 70-364 (E. D. Pa. 1970), appeal dismissed, 455 F. 2d 618 (3d Cir.), cert. denied, 407 U. S. 925 (1972); *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 43 F. R. D. 452, 461 (E. D. Pa. 1968); *School District of Philadelphia v. Harper & Row Publishers, Inc.*, 267 F. Supp. 1001 (E. D. Pa. 1967).

farce.²¹ And, when it comes to the filing and processing of claims, lawyers specializing in class actions have stated that the only effective way to induce any reasonable number of members of the class to file claims is to conduct full-scale campaigns on TV and radio, solicit appearances by advocates of consumers' rights such as Ralph Nader, letters from Congressmen to their constituents, public statements by various state attorneys general "and coverage in various news media, union newsletters and the like," also to persuade the Federal Communications Commission to classify announcements of this character as "public service announcements."²²

All the difficulties of management are supposed to disappear once the "fluid recovery" procedure is adopted. The claims of the individual members of the class become of little consequence. If the damages to be paid were only the aggregate of the sums found due to individual members of the class, after their claims had been processed, it is fairly obvious that in cases like *Eisen* the expenses of giving the notices required by amended Rule 23 and the general costs of administration of the action would exceed the amount due to the few members of the class who filed claims and the individual members of the class would get

21. Notice by publication has been sanctioned as consistent with due process of law under certain circumstances, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950). But in *Schroeder v. City of New York*, 371 U. S. 208, 212-213 (1962) the Court refined the *Mullane* rule: "The general rule that emerges from the *Mullane* case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question."

22. These suggestions were made and discussed in Shapiro, "Consumer Participation in Antitrust Class Action Part II", *New York Law Journal*, May 31, 1972, p. 1.

nothing.²³ We referred to this possibility in our opinion in *Eisen II* at pages 567 and 570.

But if the "class as a whole" is or can be substituted for the individual members of the class as claimants, then the number of claims filed is of no consequence and the amount found to be due will be enormous, affording, we are told, plenty of money to pay all expenses, including counsel fees, and a residue so large as to justify reduction of the odd-lot differential for years in the future, for the benefit of all traders, past, present and future, who are to be considered to be members of "the class as a whole."

Even if amended Rule 23 could be read so as to permit any such fantastic procedure, the courts would have to reject it as an unconstitutional violation of the requirement of due process of law. But as it now reads amended Rule 23 contemplates and provides for no such procedure. Nor can amended Rule 23 be construed or interpreted in such fashion as to permit such procedure. We hold the "fluid recovery" concept and practice to be illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper.

VII

A Few General Observations

Perhaps in part due to the liberal views on the subject of amended Rule 23, as expressed in our opinion in *Eisen*

23. The recent draft for the *Manual for Complex Litigation* suggests that problems of administering the class action should not justify denial of an appropriate class action request "except when the attention and resources required to be devoted strictly to administrative matters will frustrate the securing of ultimate relief to which the class members may be entitled." (p. 36). Due to our rejection of the fluid class recovery concept, we are compelled to conclude that this litigation falls squarely within this exception contemplated in the Manual. The administrative problems posed by this action will frustrate any effort to provide the individual class members with compensation for the alleged injuries.

II, and doubtless stimulated by the counsel fees allowed in the *Transitron* and the *Drug Cases*, where large voluntary settlements had been approved and administered by District Judges, there has followed such a quantity of comment pro and con on the questions of law we are to decide in this case, by law professors, by judges, and especially by lawyers specializing in class actions, expressed in numerous articles, opinions and published speeches, that the task of even attempting to enumerate all of these for purposes of documentation is too much for us.

Class actions have sprouted and multiplied like the leaves of the green bay tree. No matter how numerous or diverse the so-called class may be or how impossible it may be ever to compensate the individual members of the class, a champion steps forth. Thus class actions have been brought "on behalf of all subscribers of business telephones in New York County, all Master Charge credit card holders similarly situated, all consumers of gasoline in a given state or states, all homeowners in the United States, and even all people in the United States."²⁴ So far as we are aware not a single one of these class actions including millions of indiscriminate and unidentifiable members has ever been brought to trial and decided on the merits. But the preliminary procedures, including the preliminary mini-hearing on the merits, such as those conducted by Judge Tyler in order to decide whether or not this case was a proper class action, and the huge and unavoidable expense of producing witnesses and documents pursuant to discovery orders, have brought such pressure on defendants as to induce settlements in large amounts as the alter-

24. In the Report and Recommendations of the Special Committee of the American College of Trial Lawyers on Rule 23 of the Federal Rules of Civil Procedure, issued March 15, 1972, this quotation appears on p. 6 with supporting citations.

native to complete ruin and disaster, irrespective of the merits of the claim.²⁵

The "*in terrorem*" effects of the innovations described in *Dolgow* have been highly praised by those who invented or applied them.²⁶ But Professor Milton Handler, whose Annual Antitrust Review has for many years brought his expertise in Trade Regulation and, we are happy to say, some entertainment to the members of the Association of the Bar of the City of New York, and to the members of the Bench and Bar in general, minces no words. He calls these procedures "legalized blackmail."²⁷ There is reason to believe that the practical effect of these procedures, and the fact that possible recoveries run into astronomical amounts, generate more leverage and pressure on defendants to settle, even for millions of dollars, and in cases where the merits of the class representatives claim is to say the least doubtful, than did the odd-fashioned strike suits made famous a generation or two ago by Clarence H. Venner.

And yet, even if amended Rule 23 furnishes no satisfactory solution in situations where immense numbers of consumers have been mulcted in various ways by illegal

25. *Id.*, at 16. See also, *Morris v. Burchard*, 51 F. R. D. 530, 536 (S. D. N. Y. 1971).

26. See, *Dolgow v. Anderson*, 43 F. R. D. 472, 487 (E. D. N. Y. 1968); Miller, *Problem In Administering Relief In Class Actions Under Federal Rule 23(b)(3)*, 54 F. R. D. 501, 508; Pomerantz, *New Developments in Class Actions—Has Their Death Knell Been Sounded?*, 25 Bus. Lawyer 1259 (1970).

27. Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits—The 23rd Annual Antitrust Review*, 71 Colum. L. Rev. 1, 9 (1971). See also, Professor Handler's 24th Annual Antitrust Review, 72 Colum. L. Rev. 1, 34-42, in which he criticizes the fluid recovery procedure as sought to be applied in "class" actions. There are some additional trenchant comments in his 25th Annual Antitrust Review, published in the December, 1972 issue of *The Record of the Association of the Bar of the City of New York*, pp. 660 ff.

charges, it would seem that some means should be provided by law for the redress of these wrongs to the community and to society as a whole. The numerous decisions by courts in these class action cases have at least exposed the lack of adequate remedy under existing laws. From our extensive study of the whole situation in working on this *Eisen* case it would seem that amended Rule 23 provides an excellent and workable procedure in cases where the number of members of the class is not too large. It seems doubtful that further amendments to Rule 23 can be expected to be effective where there are millions of members of the class, without some infringement of constitutional requirements. The problem is really one for solution by the Congress. Numerous administrative agencies protect consumers in various ways. It should, we think, be possible for the Congress to create some public body to do justice in the matter of consumers' claims in such fashion as to afford compensation to the injured consumer. If penalties are to be imposed upon wrongdoers, at least let the Congress decide how the money is to be spent.

Another possibility, suggested by the Report and Recommendations of the Special Committee of the American College of Trial Lawyers, is a further amendment to amended Rule 23 consisting of a new subdivision providing:

In an action commenced pursuant to subdivision (b)(3), the court shall consider whether justice in the action would be more effectively served by maintenance of the action as a class action pursuant to subdivision (b)(2) in lieu of (b)(3).

The procedure involved in applying for prospective injunctive relief is relatively simple and inexpensive, social and economic reforms may be implemented and an end put to illegal practices with far more benefit to the community than that derived from minimal or token payments to individual members of a class. Attorney's fees in such cases

should also provide adequate incentive to counsel for the representative or representatives of the class.²⁸

Conclusion

For the reasons stated in this opinion the findings and conclusions following the mini-hearing are vacated and set aside, the various rulings of the District Court sustaining the prosecution of the case as a class action are reversed and, as a class action, the case is dismissed, without prejudice to the continuance of so much of the claim asserted in the complaint as refers to Eisen's alleged individual rights against the defendants.

HAYS, *Circuit Judge*, concurring in the result:

I concur in the result because I am unable to accept the ruling of the district court requiring the defendants to pay 90 per cent of the cost of notice, since, if the defendants should finally prevail, they would not be reimbursed for this expenditure.

28. In his recent book *FEDERAL JURISDICTION: A GENERAL VIEW*, containing his 1972 Columbia University James S. Carpentier Lectures, Chief Judge Friendly makes this comment on class actions pursuant to amended Rule 23, at page 120, omitting footnotes:

Something seems to have gone radically wrong with a well-intentioned effort. Of course, an injured plaintiff should be compensated, but the federal judicial system is not adapted to affording compensation to classes of hundreds of people with \$10 or even \$50 claims. The important thing is to stop the evil conduct. For this an injunction is the appropriate remedy, and an attorney who obtains one should be properly compensated by the defendant, although not in the astronomical terms fixed when there is a multi-million dollar settlement. If it be said that this still leaves the defendant with the fruits of past wrong-doing, consideration might be given to civil fines, payable to the government, sufficiently substantial to discourage engaging in such conduct but not so colossal as to produce recoveries that would ruin innocent stockholders or, what is more likely, produce blackmail settlements. This is a matter that needs urgent attention.

**OPINION OF UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT, DATED MAY 24, 1973
DENYING MOTION FOR REHEARING IN BANC,
CONCURRING OPINION OF JUDGE MANSFIELD,
DISSSENT OF JUDGE HAYS, AND DISSSENTING
OPINION OF JUDGE OAKES.**

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Cal. 341—September Term, 1972.

(Filed May 14, 1973

Decided May 24, 1973.)

Docket No. 72-1521

MORTON EISEN, on behalf of himself and all other purchasers and sellers of "odd-lots" on the New York Stock Exchange similarly situated,

Plaintiff-Appellee,

v.

CARLISLE & JACQUELIN and DECOPPET & DOREMUS, each limited partnerships under New York Partnership Law, Article 8, and NEW YORK STOCK EXCHANGE, an unincorporated association,

Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ A. DANIEL FUSARO

Clerk

A petition for a rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for plaintiff-appellee, a poll of the judges in regular

active service having been taken at the request of such a judge, and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Judges Hays, Oakes and Timbers dissent.

/s/ HENRY J. FRIENDLY
Chief Judge

KAUFMAN, Circuit Judge, with whom Judges FRIENDLY, FEINBERG, MANSFIELD, and MULLIGAN, concur.

I vote against en banc, not because I believe this case is unimportant, but because the case is of such extraordinary consequence that I am confident the Supreme Court will take this matter under its certiorari jurisdiction. Judge Oakes's opinion, dissenting from the denial of en banc, illustrates some of the far-reaching implications the panel's opinion might have on the initiation and administration of certain class action litigation in the future. En banc consideration by this court, however, would merely serve as an instrument of delay. Moreover, the application for certiorari will not go to the Supreme Court barren of the views of the judges of this court as, for example, in the Pentagon Papers case, where the court convened en banc but, because of urgent time considerations, did not write opinions. Judge Oakes has set forth his views on the merits with vigor and Judge Medina's panel opinion articulates the opposing position. Our decision to decline en banc consideration of this case in no way implies, as my brother Oakes suggests, the demise of en banc in future cases of exceptional importance; nor does it threaten to turn this collegial court into a fragmented judicial body of panels of three, in which each panel's opinions speak only for the panel, and not for the whole Court. Instead,

we wisely speed this case on its way to the Supreme Court as an exercise of sound, prudent and resourceful judicial administration.

MANSFIELD, *Circuit Judge*:

I concur in Judge Kaufman's opinion.

The issues raised by this appeal are of exceptional importance and therefore deserving of the most authoritative resolution possible. If the recent history of *en banc* proceedings in this Court is any indication, however, an *en banc* hearing would result in opinions expressing diverse views, necessitating ultimate resolution by the Supreme Court. See, e.g., *Rodriguez v. McGinnis*, 456 F. 2d 79 (2d Cir. 1972), *reversed sub nom. Preiser v. Rodriguez*, 41 U. S. L. W. 4555 (May 7, 1973). In the meantime one year's delay would be added to this already protracted proceeding. This predicament might be avoided by granting the petition and, with the case then before us *de novo*, invoking the Supreme Court's jurisdiction through the rarely used procedure provided by 28 U. S. C. § 1254(3), which empowers us *sua sponte* to certify grave questions to it for final decision where we believe the answers to be in doubt. See 28 U. S. C. Rules 28-29, Revised Rules of the Supreme Court (1973 Supp.); *Old Colony Trust Co. v. Commissioner*, 279 U. S. 716, 728-29 (1929). However, since I am persuaded that the Supreme Court, in view of the far-reaching significance of the issues, will in all likelihood grant certiorari, I believe that such a procedure is unnecessary. Otherwise I would agree with Judge Oakes' forceful plea for an *en banc* hearing.

HAYS, *Circuit Judge*, dissenting:

I believe that this case should be reconsidered *en banc*.

OAKES, *Circuit Judge* (dissenting from the denial of rehearing en banc), with whom Judge Timbers concurs:

For this court not to hear a matter of this significance is to render the en banc statute¹ a nullity. One may in this era of burgeoning appellate business quite plausibly take the view that the en banc procedure should not be used "merely" to correct individual injustices² or mistakes, but only in a case where the panel decision³ is in serious conflict with prior decisions of the particular Circuit Court of Appeals or where it is of extreme importance. Even with that view, however, this case, if no other decided in recent years, qualifies for en banc treatment. I say this for the following reasons which I will enumerate, adding a few comments subsequently:

1. The case is extremely important and vitally affects class actions, particularly environmental and consumer actions, affecting large numbers of citizens.

2. The panel opinion reaches a result which is very doubtful to say the least; on its face the opinion appears to nullify much of Fed. R. Civ. P. 23.

1. Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof.

28 U. S. C. § 46(c).

2. Occasionally a vote to rehear a panel opinion en banc has been effective in the administration of individual justice. See *United States ex rel. Whitmore v. Malcolm*, No. 72-1706 (2d Cir., Jan. 22, 1973), slip op. at 1615 (2-1 decision), where following this court's vote to rehear en banc a panel opinion affirming a denial of habeas corpus and with the rehearing en banc pending before us, the State prosecutor dismissed the case against the appellant, thereby mooting the appeal.

3. I speak of a panel decision as one by three judges sitting on a Court of Appeals.

3. The case should be heard en banc; the procedure is there and presumably is to serve some purpose, and the Supreme Court has admonished the Courts of Appeal to make use of it.

4. There are no compelling reasons for not hearing the case en banc.

The Case Is of Extreme Importance; It Vitrally Affects Class Actions.

I would expect that the case would be conceded by each and every one of the judges voting to deny en banc treatment, if he were polled, to be of extreme importance. Judge Kauman's opinion makes this concession.

The panel opinion defines as unmanageable any case involving a large class where actual notification of readily ascertainable members is expensive. It calls notice by publication to a large class a "farce" and casts constitutional doubts on any other construction of Rule 23. The case accordingly affects adversely much consumer and environmental litigation, as well as all antitrust and other claims by numbers of little people for small amounts.⁴ The panel opinion seems on its face to give a green light to monopolies and conglomerates who deal in quantity items selling at small prices to proceed to violate the antitrust laws, un-

4. I say "little people" because bigger investors don't generally deal in odd lots. They prefer to avoid the price differential in brokerage fees dealing in lots of 100 or more. It is interesting to contrast this case with *Lanza v. Drexel*, No. 35794 (2d Cir., Apr. 26, 1973), slip op. at 3033 (en banc), where this court did en banc and reverse a panel ruling that had a bearing, although in quite a limited factual situation in my opinion, on the liability for Securities Act violations of directors unconnected with management but highly involved financially. The panel opinion's decision here was partially reached in the name of fairness to defendants who thereby may retain, if the plaintiff's allegations are proven, profits obtained by violation of the antitrust laws. As I compute the cost of mailing readily identifiable members of the class from Judge Tyler's opinion, it was just over ten cents apiece or \$218,750. 52 F. R. D. at 263.

hampered by any realistic threat of private consumer civil proceedings, leaving it to some vague future act of Congress to protect the innocent consumer. The panel opinion as I read it tells polluters that they are pretty safe from class actions because even if a whole city is blanketed in smoke or its water supply contaminated, the plaintiffs can never advance the money for notices to, say, all the people in the city phone book, who certainly are identifiable. I will not belabor the point of importance.

The Panel Opinion Reaches a Very Doubtful Result.

To vote in favor of rehearing a case en banc should not necessarily mean that the judge is thereby committed to overturn the panel opinion as Judge Timbers pointed out dissenting from the denial of rehearing en banc in *Zahn v. International Paper Co.*, 469 F. 2d 1033 (2d Cir.), *rehearing en banc denied*, 469 F. 2d 1033, 1041, n. 1 (2d Cir. 1972) (dissenting opinion of Timbers, J., joined by Oakes, J.), *cert. granted*, 41 U. S. L. W. 3441 (U. S., Feb. 20, 1973) (No. 72-888). At the same time, if one agrees fully with the panel decision one does not generally vote to hear it en banc. I take the view that it is only when there is reasonable doubt on a point, or the question or questions are unresolved in the judge's mind, that he should vote for en banc, and then only in unusual or extremely important cases, or cases which conflict with prior decisions of this circuit or the Supreme Court.

Serious questions about the panel's conclusions as to the management of class actions exist. Class actions, I had thought, were "an invention of equity . . . mothered by the practical necessity" of providing a practical procedure to enable large numbers of litigants to enforce their common rights. *Montgomery Ward & Co. v. Langer*, 168 F. 2d 182, 187 (8th Cir. 1948). See C. Wright, Federal

Courts 306 (2d ed. 1970); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 375 *et seq.* (1967). The panel's decision seems utterly inconsistent with the flexible, equitable spirit that motivated the innovative 1966 amendments to Fed. R. Civ. P. 23.

The panel opinion is at the very least highly debatable on its face since it requires, without even considering division of a large class into a much smaller subclass under Rule 23(c)(4)(B), an individual plaintiff to pay the cost of actual notice to the identifiable members of the entire class which he seeks to represent and since it declares—I may add without any support or citation of authority whatsoever other than judicial fiat—that “Where there are millions of dispersed and unidentifiable members of the class notices by publication giving the essential information required by amended Rule 23 are a farce.” Slip op. at 3239.

The view of *Eisen II*, 391 F. 2d 555 (1968), that Rule 23(c)(2) requires individual notice to all members of Eisen's class who can be identified through “reasonable effort” has been criticized as “unnecessarily restrictive” 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1786 at 148 (1972); *see also* Kaplan, *supra*, 81 Harv. L. Rev. at 396; Comment, *Class Actions under Federal Rule 23(b)(3)—The Notice Requirement*, 29 Md. L. Rev. 139 (1969). Certainly given the importance of the class action as a means for the little man to bring wealthy or powerful interests into court, Eisen's inability to bear the costs of mailing notice to those 2,000,000 or so “easily identifiable individuals” similarly situated, *Eisen v. Carlisle & Jacquelin*, 52 F. R. D. 253, 257 (S. D. N. Y. 1971), should not necessarily terminate the class action character of this suit. It may be appropriate, as

Judge Tyler suggested below, to charge the defendants with a portion of the notification costs. See *Dolgow v. Anderson*, 43 F. R. D. 472, 498-500 (E. D. N. Y. 1968) (Weinstein, J.); C. Wright, *supra* at 313-14. But even if these two questions were decided against the plaintiff, an en banc decision drawing sustenance from the flexible, still developing Rule 23 jurisprudence might embrace one of several other alternatives to the panel's burial of larger-number plaintiff class actions. These include the alternatives suggested by Judge Weinstein and others discarded in the panel opinion. But there are others, too.

The plaintiff class might, for example, be divided into much smaller subclasses, Fed. R. Civ. P. 23(c)(4)(B), of odd lot buyers for particular periods, and one subclass treated as a test case, with the other subclasses held in abeyance. Individual notice at what would probably be a reasonable cost could then be given to all members of the particular small subclass who can be easily identified. See Kaplan, *supra*, 81 Harv. L. Rev. at 390-91; Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 Buffalo L. Rev. 433, 438-54 (1960).

The problem of individualized notice under Rule 23 (c)(2) is so important to the future of class actions and the panel's resolution of it seems so inconsistent with the spirit of Rule 23, in short, that consideration by the full court seems essential.

At least as questionable is the panel's conclusion that this class action is unmanageable and should be dismissed because "no notice by publication could be devised by the ingenuity of man that could reasonably be expected to notify more than a relatively small proportion of the class." Slip op. at 3238. The panel seems to intimate in a footnote that individualized notice to all 6,000,000 members of the class borders on being a constitutional require-

ment. Slip op. at 3239, n. 21. This intimation seems to me to be profoundly incorrect. In my view notice to class members who cannot be identified is not a constitutional requirement and not a prerequisite to a manageable class action. All that the due process clause requires is a procedure that "fairly insures the protection of the absent parties who are to be bound by [the judgment]." *Hansberry v. Lee*, 311 U. S. 32, 42 (1940) (not cited by panel decision). See *Mullane v. Central Hanover Bank and Trust Co.*, 339 U. S. 306, 313-14 (1950); *Northern Natural Gas Co. v. Grounds*, 292 F. Supp. 619, 636 (D. Kan. 1960). See also C. Wright, *supra* at 313; Kaplan, *supra*, 81 Harv. L. Rev. at 391-92. But cf. *Eisen II*, 391 F. 2d at 368-69. The Advisory Committee is a respectable body of procedural experts who did not consider individualized notice to all or a certain percentage of class members a prerequisite to the maintenance of a Rule 23 class action as a constitutional (or extraconstitutional) requirement. Advisory Committee Notes, 28 U. S. C. A., Rule 23 Supplementary Note at 302. The commentators generally agree. Assuming vigorous representation of the class's interests by the representative plaintiff (which is not in issue here), notice by publication to unidentifiable class members is constitutionally sufficient. *Mullane v. Central Hanover Bank and Trust Co.*, *supra*, 339 U. S. at 314. A scheme of notice by publication (with costs perhaps taxed to the defendants) in financial journals of wide circulation—the *Wall Street Journal*, *Business Week*, *Barron's*, the *New York Times* financial section, and the like—would reach most of the class.

To say, as the panel opinion says, slip op. at 3239, that "[w]here there are millions of dispersed and unidentifiable members of the class notices by publication . . . are a farce," and to say it without any supporting data

or authority, strikes me as, in the words of the panel opinion, a "rhetorical device," slip op. at 3231. In this day and age of communications, why are such notices a "farce"? It may be that most people will not heed them—the sums may be too small to bother with, for example—but does this make the notices farcical? Probate notices published in small-town newspapers around the country are treated as notice to the whole world of possible creditors and heirs that an estate is being closed, and they are pretty effective for this purpose. Notice by publication of actions such as this in key, spot places can be, I should think, highly effective. If notice in the "Drug Cases," *State of West Virginia v. Charles Pfizer & Co.*, 314 F. Supp. 710 (S. D. N. Y. 1970), *aff'd*, 440 F. 2d 1079 (2d Cir.), *cert. denied sub nom. Cotler Drugs, Inc. v. Charles Pfizer & Co.*, 404 U. S. 871 (1971), could work reasonably well, why can't it work with a somewhat more sophisticated group of consumers, odd lot buyers? Rule 23 was not looking toward perfect or total notification; it was—and I write of it in the past tense for this purpose—reaching out for a practical result that would permit numbers of little injured people to have their day, too, in court.

The panel opinion's suggestion, slip op. at 3243, that it should "be possible for the Congress to create some public body to do justice in the matter of consumers' claims in such fashion as to afford compensation to the injured consumer" is in my view an abdication of judicial responsibility. It is as much as to say that the courts are insufficiently inventive to be capable of handling a matter—the distribution of unlawfully obtained money to a large number of people. I doubt this very much. I suspect that the courts can do the job.

All in all, it seems to me that the panel's decision not merely ossifies, but destroys, the development of what was

becoming an important procedural device for the airing of grievances where large numbers of people were affected and one individual did not have the resources to pursue his own legal rights to conclusion. At the very least the panel opinion should not be allowed to stand without full and complete consideration by the full active bench of this circuit, aided as we would be by the consultation and vote of the two distinguished senior judges who sat on the panel in question.

The Case Should Be Heard En Banc.

One can argue, as many wiser minds than the writer's have argued, that a court of appeals should never use the en banc procedure. The Learned Hand court was apparently able never to sit en banc. *See generally* M. Schick, *Learned Hand's Court* 105-06, 116-22 (1970). But this was before the number of judges on the court was expanded to meet the court's burgeoning business. In other words, it was when the court and its business were small enough to enable a good deal more consultation before adjudication among the judges on the court than now does or can occur. Never to use the en banc procedure would tend to fragment a court of 14 or 15 judges into panels of three, enabling a given panel—which sometimes consists of judges not appointed to the particular circuit court—to determine cases for the whole court. If panel decisions absent an en banc procedure were to be binding on the other members of the court (as with an en banc procedure this court has always treated them in the past), there would be (A) an even greater burden on the Supreme Court than it now has to correct egregious error or to examine important cases and (B) an individual active circuit court judge's vote would count, at least in the Second Circuit, in only the 160-220 cases per year on which he sits and be of no

significance whatever in the remaining 1,000± cases⁵ coming before the court.

In the event this court's tradition were to be broken and an individual panel's determination were *not* to be binding on the rest of the court, the Supreme Court's burden would be equally great and this court would be even more fragmented. Its decisions would merit only the support that the persuasiveness of the individual opinion writer or the prestige of the particular panel could muster. There would be no "law of the circuit" as such. The district judges and others who look to the Court of Appeals for guidance in their decision-making would find none.

Thus it seems to me that the en banc procedure, or some viable substitute for it, is essential to ensure cohesion, a degree of uniformity and the promotion of appellate justice, in the Court of Appeals. The en banc power has received the imprimatur of an 8-1 Supreme Court, in a case that is still law, as "a necessary and useful power—indeed too [sic] useful that we should ever permit a court to ignore the possibilities of its use in cases where it might be appropriate." *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 345 U. S. 247, 260 (1953). There are those of us, I suspect, who think the exercise of that power is one alternative preferable to the controversial national court of appeals which is receiving considerable attention these days.

The only viable alternative to the en banc procedure, if there is to be any genuine "court" position on a given case, is the prepublication circulation of all opinions for comment which is done in some circuits. This would be

5. For fiscal year 1972, an unusually light year in this circuit, there were a total of 1,317 filings and 177 appeals terminated without decision. 1973's figures indicate that about 1,200 cases will come before the court.

somewhat helpful but has the disadvantages of being advisory only, unless the en banc procedure is invoked; it also creates some work under the pressure of time deadlines additional to that which the en banc procedure permits. Prior circulation in seemingly important cases which is done in this circuit fairly frequently, with I think good result, but was not done in this particular case, has some merit, too; at least it may alert the whole court to an important case or the opinion writer or panel to some serious questions. Here even this alternative has been unavailable.

There Is No Good Reason for Not Hearing This Case En Banc.

There is no real pressure of time (the lapse of time since *Eisen II* is five years; the Supreme Court is unlikely to examine the inevitable petition for a writ of certiorari until four or five months from now),⁶ that would, as to some extent it did in the Pentagon Papers case,⁷ make en banc rehearing or opinion writing unfeasible. There is no reason why the Supreme Court should not have before it some view, even if it is not a majority one, from this court, different from the panel's if, as I think is undoubtedly the case, an en banc vote would result in such.

It is said or suggested that this case is so important that it will surely result in a grant of certiorari. With all respect I do not know how we can be so prescient about the United States Supreme Court. It may decide that it wants to hear from other circuits, and have a more balanced view before it, than what is now the Second's, before

6. We are told that the average en banc proceeding takes about 155 days. This is not really necessary in my view but in this case would not be too harmful.

7. *United States v. New York Times Co.*, 444 F. 2d 544 (2d Cir. 1971), *rev'd*, 403 U. S. 713 (1971).

it grants the all powerful writ. The Court may decide that it prefers to postpone the issue until another day, for reasons of internal administration or external policy.

I believe in short that our duty is to hear this case en banc. Since the panel opinion sounds the "death knell," see *Eisen v. Carlisle & Jacquelin*, 370 F. 2d 119 (2d Cir. 1966), cert. denied, 386 U. S. 1035 (1967), for consumer and environmental class actions, the omission to do so is to my mind grievous. Perhaps, however, it will serve as a vehicle for a higher authority to tell us whether the admonitions of *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, supra, relative to the en banc procedure still have any meaning. If they do not, the world may not come to an end, but we will be an interesting court to watch as our eight active and six senior and numerous visiting and district judges go from decision to decision, guided 2 per cent⁸ of the time by a grant of certiorari. We will at least be somewhat unpredictable, and this may create enough litigation on the chance that an individual panel may reverse that our calendar will become as unmanageable as the panel opinion felt the instant class action was.

8. From information furnished by the Circuit Executive of our court, in fiscal year 1972 there were 369 petitions for certiorari from the Second Circuit filed and only 18 granted. In fiscal year 1973, 284 petitions have been filed and only 12 granted. If in forma pauperis petitions are included as cases heard by our court, the percentage of certiorari grants is closer to 1.

**ITEMIZED BILL OF COSTS FILED BY DEFENDANTS-
APPELLEES IN THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT
ON MAY 15, 1973.**

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Judgment having been entered in the above-entitled action on May 1, 1973, reversing the rulings of the District Court which sustained the prosecution by plaintiff of the case as a class action, the Clerk is requested to tax the following as the costs of the defendants on appeal:

•Docket Fee \$ 25.00

Bar Press, Inc.—printing Appendix (annexed hereto as Exhibit “A” and made a part hereof is a copy of Bar Press, Inc.’s bill dated July 31, 1972 for printing said Appendix) \$ 4,185.31

Bar Press, Inc.—printing defendants’ joint Main Brief (annexed hereto as Exhibit “B” and made a part hereof is a copy of Bar Press, Inc.’s bill dated July 31, 1972 for printing said Main Brief) \$ 4,541.08

Bar Press, Inc.—printing defendants’ joint Reply Brief (annexed hereto as Exhibit “C” and made a part hereof is a copy of Bar Press, Inc.’s bill dated October 23, 1972 for printing said Reply Brief) \$ 1,999.95

Bar Press, Inc.—printing defendants’ joint Supplemental Statement (annexed hereto as

Defendants' Itemized Bill of Costs

Exhibit "D" and made a part hereof is a copy of Bar Press, Inc.'s bill dated January 16, 1973 for printing said Supplemental Statement)

\$ 845.40

Total:

\$11,596.74

Carter, Ledyard & Milburn

By Louis L. Stanton, Jr.

A Member

Attorneys for Defendant-Appellee

Carlisle & Jacquelin

2 Wall Street

New York, New York 10005

Kelley Drye Warren Clark Carr &
Ellis

By Brad G. Holman

A Member

Attorneys for Defendant-Appellee

DeCoppet & Doremus

350 Park Avenue

New York, New York 10022

Milbank, Tweed, Hadley & McCloy

By William E. Jackson

A Member

Attorneys for Defendant-Appellee

New York Stock Exchange, Inc.

One Chase Manhattan Plaza

New York, New York 10005

VERIFICATIONS

State of New York)
County of New York) ss.:

LOUIS L. STANTON, JR., being duly sworn, deposes and says:

I am a member of the firm of Carter, Ledyard & Milburn, attorneys for defendant-appellee Carlisle & Jacquelin and am familiar with the proceedings had herein, including the preparation of the case on appeal.

The items in the above Bill of Costs are correct to the best of my knowledge and belief, have been necessarily incurred in the appeal, and the services for which fees have been charged were actually and necessarily performed.

LOUIS L. STANTON, JR.
Louis L. Stanton, Jr.

Sworn to before me this 14 day of May, 1973.

DOROTHY MOROSI
Notary Public, State of New York
No. 24-2773675
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

BUD G. HOLMAN, being duly sworn, deposes and says:

I am a member of the firm of Kelley Drye Warren Clark Carr & Ellis, attorneys for defendant-appellee DeCoppet & Doremus and am familiar with the proceedings had herein, including the preparation of the case on appeal.

The items in the above Bill of Costs are correct to the best of my knowledge and belief, have been necessarily incurred in the appeal, and the services for which fees have been charged were actually and necessarily performed.

BUD G. HOLMAN,
Bud G. Holman.

Sworn to before me this 9th day of May, 1973.

JOSEPH WARREN
Notary Public, State of New York
No. 03-9539130
Qualified in Bronx County
Certificate filed in New York County
Commission Expires March 30, 1974

Defendants' Itemized Bill of Costs

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STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

RUSSELL E. BROOKS, being duly sworn, deposes and says:

I am a member of the firm of Milbank, Tweed, Hadley and McCloy, attorneys for defendant-appellee New York Stock Exchange, Inc., and am familiar with the proceedings had herein, including the preparation of the case on appeal.

The items in the above Bill of Costs are correct to the best of my knowledge and belief, have been necessarily incurred in the appeal, and the services for which fees have been charged were actually and necessarily performed.

RUSSELL E. BROOKS,
Russell E. Brooks.

Sworn to before me this 11th day of May, 1973.

ROSEMARIE D. IOVINO
Notary Public, State of New York
No. 24-7039475
Qualified in Kings County
Cert. filed in New York County
Commission Expires March 30, 1974

A394

Exhibit "A"

EXHIBIT "A".

TELEPHONE WO 6-3906

B A R P R E S S , Inc.

132 LAFAYETTE STREET, NEW YORK, N. Y. 10013

July 31, 1972

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Alterations	120.00
Extra Proofs	N/C
Binding	82.80
	<hr/>
	\$3,911.50
sales tax	273.81
	<hr/>
	\$4,185.31

Exhibit "B"

A395

EXHIBIT "B".

TELEPHONE WO 6-3906

B A R P R E S S , Inc.

132 LAFAYETTE STREET, NEW YORK, N. Y. 10013

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Extra Proofs	69.10
Binding 30 copies @ 63¢	18.90
Extra Deliveries	32.00
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	\$4,244.00
sales tax	297.08
	<hr/>
	\$4,541.08

A396

Exhibit "C"

EXHIBIT "C".

TELEPHONE WO 6-3906

B A R P R E S S , Inc.

132 LAFAYETTE STREET, NEW YORK, N. Y. 10013

October 23, 1972

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30 copies Reply Brief

27 pp. @ \$14.00 for 30 copies	\$ 378.00
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Preparing Index	11.00
Paging Index	27.00
Alterations	432.00
Remakeup	13.50
Overtime	749.25
Extra Proofs	58.56
Extra Deliveries	36.00
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	\$1,869.11
sales tax	130.84
	<hr/>
	\$1,999.95

Exhibit "D"

A397

EXHIBIT "D".

TELEPHONE WO 6-3906

B A R P R E S S , Inc.

132 LAFAYETTE STREET, NEW YORK, N. Y. 10013

January 16, 1973

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sales tax 55.31

\$790.09

\$845.40

**ORDER OF UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT DATED MAY 24, 1973
DENYING PETITION FOR REHEARING.**

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

[SAME TITLE]

A petition for a rehearing having been filed herein by
counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO,

A. Daniel Fusaro,

Clerk.

**ORDER OF UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT DATED MAY 24, 1973
DENYING PETITION FOR REHEARING
IN BANC.**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[SAME TITLE]

A petition for a rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for plaintiff-appellee, a poll of the judges in regular active service having been taken at the request of such a judge, and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.
Judges Hays, Oakes and Timbers dissent.

/s/ HENRY J. FRIENDLY,
Henry J. Friendly,
Chief Judge.

**ORDER OF UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT DATED JUNE 18,
1973 STAYING ISSUANCE OF THE MANDATE.**

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

[SAME TITLE]

It is hereby ordered that the motion made herein by counsel for the appellee by notice of motion dated May 30, 1973, to stay the issuance of the mandate and entry of the itemized and verified bill of costs filed May 15, 1973, to and including July 30, 1973 pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure be and it hereby is granted.

It is further ordered that no bond will be required pending application to the Supreme Court for certiorari.

/s/ HAROLD R. MEDINA,
Harold R. Medina,

/s/ J. EDWARD LUMBARD,
J. Edward Lumbard,

/s/ PAUL R. HAYS,
Paul R. Hays,

Circuit Judges.

June 18, 1973